89-5148

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOHNNY WATKINS,

Petitioner,

v.

EDWARD MURRAY, WARDEN

Respondent.

PETITION FOR WRIT OF CERTIORARI

Counsel for Petitioner
Steven C. Losch
162 Terrace Place
Brooklyn, N.Y. 11218
212-577-7952
718-499-7756

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — PAGE(S)

OTHER AUTHORITIES — PAGE(S)

QUESTION PRESENTED

1. Where the identical jury instructions in the sentencing phase of Petitioner's two capital trials did not mention mitigating circumstances or call them to the attention of the jury in any manner, is there an unacceptable risk that the jury failed in both cases to perform their Eighth Amendment obligation to consider the aspects of his character and record that he proffered as a basis for a life sentence?

ASSIGNMENT OF ERROR

1. The Supreme Court of Virginia erred in holding that there was no reversible error committed when the juries in Petitioner's two capital sentencing trials were not given any instructions about their duty to consider mitigating circumstances and the juries consequently had discretion to refuse to consider aspects of his character and record that called for a life sentence, in violation of Eddings v. Oklahoma.

JURISDICTION

The jurisdiction of this Court is invoked under U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

The Virginia statute that states the substantive standards for imposition of the death sentence is Va. Code Ann. § 19.2-264.2 (Cum. Supp. 1977):

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find there there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

According to Va. Code Ann. § 19.2-264.4(B), mitigating evidence may include, but shall not be limited to, the following:

> (i) The defendant has no significant history of prior criminal activity, or
>
> (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, or
>
> (iii) the victim was a participant in the defendant's conduct or consented to the act, or
>
> (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or
>
> (v) the age of the defendant at the time of the commission of the capital offense.

CONSTITUTIONAL PROVISIONS INVOLVED

This case presents violations of the Eighth and Fourteenth Amendments to the United States Constitution, which are set out, in pertinent part, as follows:

> Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.
>
> U.S. CONST. AMEND. VIII.
>
> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .
>
> U.S. CONST. AMEND. XIV.

STATEMENT OF THE CASE

The Material Proceedings

Petitioner Johnny Watkins was convicted and sentenced to death for the capital murder of Betty Jean Barker on November 14, 1983. He was also convicted and sentenced to death for the capital murder of Carl Buchanan on November 22, 1983. The two cases were separately tried by jury in the Danville Circuit Court. Circuit Judge James F. Ingram presided at both trials.

On July 13, 1984, Judge Ingram entered a judgment, confirming Mr. Watkin's conviction in the Barker case for capital murder, robbery and use of a firearm in the commission of a felony, and sentencing him to death by electrocution, life imprisonment and two years in prison.

On September 28, 1984, Judge Ingram entered a judgment, confirming Mr. Watkin's conviction in the Buchanan case for capital murder, robbery and use of a firearm during the commission of a felony, and sentencing him to death by electrocution, life imprisonment and two years in prison.

Mr. Watkins appealed to the Supreme Court of Virginia in both cases. The two appeals were consolidated. The Supreme Court of Virginia affirmed both convictions and death sentences in Watkins v. Commonwealth, 229 Va. 469, 331 S.E.2d 422 (1985) (see Appendix A).

Mr. Watkins then petitioned this Court for a writ of certiorari. On March 31, 1986, the Court denied the petition in Watkins v. Virginia, 475 U.S. 1099, 106 S.Ct. 1503 (1986). Justices Brennan and Marshall dissented because they believed that a confession was introduced in the sentencing phase of the Barker case in violation of Edwards v. Arizona, 451 U.S. 477 (1981). In a separate opinion respecting the denial of certiorari, Justice Stevens agreed that there was a violation of Edwards v. Arizona, but he

expected it to be corrected in collateral proceedings (see Appendix B).

Mr. Watkins next petitioned the Danville Circuit Court for a writ of habeas corpus. He initially filed a single petition raising all of his claims in the Barker and Buchanan cases. The warden moved to sever the two cases. In an unpublished order dated June 5, 1987, Judge Ingram granted the severance motion. In the same order, he dismissed some of the claims and ordered a plenary hearing on others (see Appendix C).

Mr. Watkins then filed separate amended petitions for habeas corpus relief in the Barker and Buchanan cases. Judge Ingram recused himself from both cases. On March 30, 1988, Circuit Judge B.A. Davis conducted a single plenary hearing on both petitions. On October 28, 1988, Judge Davis entered final orders in both cases dismissing all of the claims with findings of fact and conclusions of law (see Appendix D).

Mr. Watkins then filed a single petition for appeal to the Supreme Court of Virginia. The petition made five identical assignments of error in the Barker and Buchanan cases. In an unpublished order dated April 13, 1989, the Supreme Court of Virginia denied the petition to appeal (see Appendix E).

On May 26, 1989, Mr. Watkins applied pro se to this Court for an extension of time to file a petition for writ of certiorari. On June 7, 1989, the Court extended the time for filing until July 12, 1989.

How the Question Presented was Raised and Decided Below

At the sentencing phase of the Barker trial, defense counsel objected that the jury instructions about the statutory aggravating circumstances and the written verdict form were "unconstitutional" because this procedure "dic-

tates a verdict of the death penalty." The trial court overruled the objection.

Counsel objected to the jury instructions about statutory aggravating circumstances at the sentencing phase of the Buchanan trial, without mentioning the verdict form. This objection was also overruled.

The court gave the same jury instructions (see Appendix F) and used the same written verdict form (see Appendix G) in the Barker and Buchanan sentencing trials. The jury instructions did not mention mitigating circumstances, mitigating evidence or any synonym for these terms. The verdict forms stated that the jury considered "evidence in mitigation of the offense."

Mr. Watkins challenged the verdict forms in his consolidated direct appeal to the Supreme Court of Virginia. In his brief in the Barker case in assignment of Error 19 and Point XIII of the argument, he asserted that the verdict form and the jury instructions violated his Eighth and Fourteenth Amendment rights. He contended that this procedure "overshadows any consideration of mitigation, particularly since the statute from which the verdict form originates fails to specify any standard of proof on the question of mitigation." In the Buchanan case, he made the same claim in assignment of Error 7 and Point VII of the argument.

On direct appeal, the Supreme Court of Virginia framed the issue as whether the verdict form

> places undue emphasis on the aggravating circumstances of future dangerousness and vileness without similarly emphasizing the jury's duty to consider mitigating factors.

Watkins v. Commonwealth, 229 Va. 469, 331 S.E.2d 422, 438 (1985). The court held that there was no Eighth Amendment violation here because the "jury is instructed to consider mitigating circumstances" and the verdict form reflects that the jury "considered the evidence in mitigation of the of-

fense." Watkins v. Commonwealth, 331 S.E.2d at 438. The decision did not take cognizance of the fact that the jury instructions in the Barker and Buchanan trials did not mention mitigating circumstances or mitigating evidence.

Mr. Watkins alleged in his original petition for a writ of habeas corpus that both of his death sentences were unconstitutional because "the jury was not instructed to consider mitigating circumstances." The petition set forth the complete jury instructions and emphasized that no "mention is made in the instruction of mitigating circumstances." As authority for this claim, he cited Lockett v. Ohio, 438 U.S. 586 (1978). The same claim was repeated in the amended petitions in the Barker and Buchanan cases.

The state contended in response to the amended petitions that the claim "appears to be essentially the same claim that was raised on direct appeal" and decided on its merits in Watkins v. Commonwealth, 331 S.E.2d at 438. The state raised the defense of res adjudicata and, in the alternative, the defense of procedural default. The procedural default was a failure to raise the claim on direct appeal. No reference was made to the preservation of the issue at trial.

In an order dated June 5, 1987, the Circuit Court dismissed the jury instructions claim "for the reasons stated in the respondent's answer." On October 28, 1988, the Circuit Court made findings of fact and conclusions of law about the claim. It stated that "the jury was properly instructed as to all matters and findings that they were required to make, including but not limited to evidence in mitigation of punishment" (see Exhibit D).

In his petition to appeal to the Supreme Court of Virginia, Mr. Watkins raised the jury instructions claim in assignment of Error IV. In Point IV of the argument, he

cited both the Eighth Amendment and Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821 (1987), as authority for the claim. He contended that there was nothing in the jury instructions "to indicate that the term 'mitigation' was anything more than a mere formality on the verdict slip." The state argued in opposition to the petition for appeal, that the claim was either res adjudicata or procedurally barred because it was not raised on direct appeal.

The Supreme Court of Virginia held in its unpublished opinion on April 13, 1989, that "there was no reversible error in the judgment" and it denied the petition for appeal (see Appendix E). The opinion included plain statements of procedural default for two other claims, but it did not make any reference to the Eighth Amendment challenge to the jury instructions in both capital sentencing trials that was made in assignment of Error IV.

Because the opinion of the last state court to consider the claim does not include a plain statement that it was decided on an adequate and independent state law ground, the federal question is preserved. Harris v. Reed, ____ U.S. ____, 109 S.Ct. 1038 (1989); Michigan v. Long, 463 U.S. 1032 (1983); see also pp. 26-32 infra.

STATEMENT OF FACTS

The Convictions in the Barker and Buchanan Cases

Petitioner Johnny Watkins, a 22-year-old black man, was convicted in separate trials of the capital murders of two white convenience store clerks, Betty Jean Barker and Carl Buchanan. The two crimes were committed within a period of eight days. Mr. Watkins' friend, Quentin Nash, was his accomplice and the state's star witness in the Barker case. Mr. Watkins' brother, Darnell Watkins, was his accomplice and the state's star witness in the Buchanan case. Nash testified that Mr. Watkins was the triggerman in the

Barker case. Darnell Watkins testified that he was also the triggerman in the Buchanan case.

Nash and Darnell Watkins were convicted of non-capital charges in their separate trials. Sentencing proceedings were delayed in their cases until after they helped the State to obtain the death penalty in Mr. Watkins' trials. Darnell Watkins initially told the police that he was not involved in the Buchanan murder. When the police informed him that he could help himself if he was not the triggerman, he said that he played the role of "getaway driver." Nash said that he reluctantly agreed to be a look-out in the Barker case.

Barker was shot in the chest twice and in the cheek with a .22 caliber revolver that belonged to Mr. Watkins. Mr. Watkins and Nash took $89.89 from the cash register of the convenience store where she was killed. Buchanan was shot twice in the chest, in the temple and the hip with the same .22 caliber revolver. About $40 was taken from his wallet and an unspecified amount of money was taken from a cash drawer in the store where he was killed.

The Barker Sentencing Trial

In the sentencing phase of the Barker trial, the prosecution used a statement that Mr. Watkins made when he was in custody to prove that he committed the unadjudicated capital murder of Carl Buchanan. The statement was obtained during a dialogue that the police initiated after Mr. Watkins invoked his right to counsel, but the court refused to suppress it. Evidence of his two prior misdemeanor convictions for assault and possession of a weapon was also introduced. The assault involved a fistfight. The weapon was a knife.

The defense presented a picture of Mr. Watkins' character and record through the testimony of his mother,

her common-law husband, his great aunt, his minister and a co-worker. Mr. Watkins and his brother were born in New York City. When he was three years old, his natural mother became ill and lost her job. Because she was unable to care for her young sons, she was forced to send them to live with her aunt, Thelma Stuart, in Virginia. Mrs. Stuart raised both boys by herself. Her husband suffered from brain damage and was permanently hospitalized.

Mrs. Stuart never had any disciplinary problems with Mr. Watkins. He attended Sunday school and he was an usher in church. When he was old enough, she got him a job with the tobacco company where she worked. He was laid off, but he found other jobs at a mill and a hospital. He gave Mrs. Stuart some of his earnings to help her with household expenses.

Mr. Watkins maintained a close relationship with his natural mother and her common-law husband. He visited with them in New York City six to twelve times a year. His mother described him as "always nice, very quiet." His stepfather called him "a normal kid."

Mr. Watkins dated Audrey Womack for three years. Audrey's mother, Rebecca Womack, spent a lot of time with him. She said that he was "intelligent" and "a nice personality, always polite . . . always willing to help somebody." She was "very shocked" when she learned about the murders.

Reverend Richard Terry knew Mr. Watkins as a member of the Baptist church that he pastored. He said that Mr. Watkins was "a fine young man." He found it difficult to believe that Mr. Watkins was "capable" of killing two people.

James Barber, a nursing student, worked with Mr. Watkins for a year at Memorial Hospital, until Mr. Watkins was arrested. They had a "very friendly" relationship. Mr.

Watkins reported to work every day. He was holding down two jobs, he had a good credit rating and he was contemplating marriage when he was arrested.

In summation, defense counsel argued that while the circumstances of the crime were "very damaging," there were "certain mitigating factors" that called for mercy. He revieved the testimony about Mr. Watkins' positive character traits and concluded that Mr. Watkins was not:

> like an insect crawling across the kitchen floor. . . . This is a human being. Now, you have the instructions before you, that the court has given you. . . . I've told you what . . . I think you should consider.

The prosecutor emphasized "the circumstances surrounding this dastardly act" in his closing argument. Much of his summation was devoted to marshalling the evidence in support of the two statutory aggravating circumstances.

The jury was instructed that they could impose the death penalty if the prosecution proved at least one of the statutory aggravating circumstances -- future dangerousness or aggravated battery. The jury was required to consider the defendant's "prior history" when they decided the issue of future dangerousness. The jury was instructed further that if Mr. Watkins was eligible for death, they should decide whether a death sentence was justified by all of the evidence. Mitigating circumstances were not mentioned or explained in the jury instructions (see Appendix F). The court also read the verdict form to the jury. The verdict form stated that the jury considered the "evidence in mitigation of the offense" (see Appendix G).

The jury found that both statutory aggravating circumstances were proved beyond a reasonable doubt and they sentenced Mr. Watkins to death.

The Buchanan Sentencing Trial

The prosecution reintroduced Mr. Watkins' criminal record at the sentencing phase of the Buchanan trial, including his conviction for the capital murder of Barker. Quentin Nash and other witnesses also testified about the underlying facts of the Barker case.

Reverend Terry and Rebecca Womack testified as character witnesses for the defense and repeated the gist of their testimony in the Barker case. Thelma Stuart was subpoenaed to testify for the prosecution during the guilt phase. Evidence of her love for Mr. Watkins was elicited.

James York, a probation officer, testified about Mr. Watkins' record of employment, his upbringing by Thelma Stuart and his incomplete education. According to Mr. York's records, Mr. Watkins' natural father was killed in a bar in New York City.

Dr. William Lea, a psychiatrist, examined Mr. Watkins at the behest of the defense. He found that Mr. Watkins had a short history of "episodic substance abuse." He began using drugs heavily about five or six months before he was arrested. Mr. Watkins told Dr. Lea that on the night of the Buchanan murder, he used LSD and consumed a half pint of gin. This was confirmed by Darnell Watkins' testimony during the guilt phase that Mr. Watkins was "high as a kite" and acting "crazy" that night.

Defense counsel emphasized in his summation that "the defense raised some good things about Johnny Watkins." He pointed out that the jury was required by the court's instructions to consider Mr. Watkins' "prior history" when they resolved the issue of future dangerousness. Then, he expressed the "hope that you will consider every mitigating factor that you can."

The prosecutor argued that the statutory issue of future dangerousness was paramount. He stated that while "all this mercy business, all this sympathy business is a good argument," the jury should set it aside and focus on the threat to society. He contended that Mr. Watkins' substance abuse was not "an excuse" for the murders. He marshalled the evidence of the statutory aggravating circumstances and concluded that "the dastardly acts committed by the defendant" justified the death penalty.

The jury was given exactly the same instructions as is the Barker case and they used the same verdict form. They found both of the statutory aggravating circumstances and sentenced Mr. Watkins to death. As in the Barker case, the written death verdict contained a one-sentence boilerplate statement that the jury considered any "evidence in mitigation of the offense."

SUMMARY OF REASONS FOR GRANTING CERTIORARI

This Court should grant certiorari to decide what jury instructions in a capital sentencing trial must do, at minimum, to "bring mitigating circumstances to the jury's attention." Zant v. Stephens, 462 U.S. 862, 876, n.13 (1983). While it is beyond dispute that "the jury instructions -- taken as a whole -- must clearly inform the jury that they are to consider any relevant mitigating evidence," California v. Brown, 479 U.S. 538, 107 S.Ct. 837, 841 (1987) (O'Connor, J. concurring), the Court has not yet decided what legal principles must be communicated to the jury, to ensure that they will perform this critical task.

In the present case, the jury instructions could not have called mitigating circumstances to the jury's attention because the instructions did not mention, define or otherwise explain that term of art. The jury was simply charged in both of petitioner's trials that if they found one or more of the statutory aggravating circumstances,

> you may fix the punishment of the defendant at death or if you believe from all of the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment.

The verdict forms in both trials contained a one-line boilerplate statement that the jury considered "the evidence in mitigation of the offense," but there was no other device used to bring mitigating circumstances to their attention.

In Eddings v. Oklahoma, 455 U.S. 104, 114 (1981), this Court held that "the sentencer may not refuse to consider or be precluded from considering" any mitigating evidence. The jury instructions in this case violated both of these Eighth Amendment rules. The jury was certainly free under these instructions to refuse to consider whether there were mitigating aspects of Petitioner's character and record

that independently called for a life sentence. If they did not understand that the mitigating evidence of his character and record could serve as the basis for a life sentence, "it was as if the trial judge had instructed a jury to disregard the mitigating evidence." Eddings v. Oklahoma, 455 U.S. at 114; see also California v. Brown, 107 S. Ct. at 842 (O'Connor, J. concurring). While there is "of course, no extrinsic evidence of what the jury in this case actually" considered, there is "at least a substantial risk" that the juries in both of Petitioner's trials did not consider one or more of the mitigating circumstances. Mills v. Maryland, ___ U.S. ___, 108 S.Ct. 1860, 1869 (1988).

When this Court has reviewed jury instructions about mitigating circumstances, it has always focused on whether the jury was affirmatively precluded from considering them. See, e.g., Penry v. Lynaugh, ___ U.S. ___, 1989 WL 67223 (U.S.); Franklin v. Lynaugh, ____ U.S. ____, 108 S. Ct. 2320 (1988); Mills v. Maryland, 108 S. Ct. at 1869; Hitchock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987); California v. Brown, 107 S.Ct. at 840. These cases did not explain what a jury must be told to ensure that they will not adopt an unconstitutional definition of mitigating evidence and refuse to consider some of the mitigating circumstances, as the sentencing judge did in Eddings v. Oklahoma, 455 U.S. at 109, and the jury could have done here.

This "black hole" in the Court's contemporary capital punishment jurisprudence has left room for considerable confusion and conflict among the lower federal and state courts. See, e.g., Peek v. Kemp, 784 F.2d 1479, 1485-94 (11th Cir. 1986) (en banc) (general definition of mitigating circumstances not required where court gave examples of it and explained that the defense proffers mitigating evidence and prosecution proffers aggravating evidence);

Briley v. Bass, 750 F.2d 1238, 1243-1245 (4th Cir. 1984) (use of words "mitigating circumstances" was sufficient without general definition or examples); Bell v. Watkins, 692 F.2d 999, 1011-12 (5th Cir. 1982) (use of words "mitigating circumstances" without general definition or examples violated Eighth Amendment); Whalen v. State, 492 A.2d 552, 560-561 (Del. Supr. 1985) (use of words "mitigating circumstances" without general definition or an explanation of the role of mitigating evidence violated Eighth Amendment); Ross v. State, 254 Ga. 22, 326 S.E.2d 194, 204 (1985) (use of words "mitigating circumstances" without general definition or examples was sufficient); State v. Bartholomev, 101 Wash.2d 631, 683 P.2d 1079, 1089 (1984) (reading of statutory mitigating circumstances was sufficient without general definition); Waye v. Commonwealth, 219 Va. 683, 251 S.E.2d 202, 212 (Va. 1979) (use of words "mitigating circumstances" and reading of statutory mitigating circumstances was sufficient without general definition).

These conflicting decisions are not merely a reflection of the diversity of the procedures for imposing the death penalty in different states. The Eleventh Circuit has been unable to apply its own rule consistently to cases from Georgia. Compare Peek v. Kemp, 784 F.2d at 1485-94 (general definition of mitigating circumstances not required where instructions gave specific examples and explained role of defense in proffering such evidence) with High v. Kemp, 819 F.2d 988, 991 (11th Cir. 1987) (use of term "mitigating circumstances" without general definition was sufficient, although instructions did not give specific examples as in Peek) and Dobbs v. Kemp, 790 F.2d 1499, 1512-13 (11th Cir. 1986) (use of term "mitigating circumstances" without general definition was sufficient, although instructions did not explain the role of defense in proffering such evidence as

in Peek). The Eleventh Circuit and other courts have reached inconsistent conclusions about the core Eighth Amendment principles that must be communicated to the jury in every capital sentencing trial to ensure that they will consider all of the mitigating evidence and give it whatever weight it deserves.

This Court should grant certiorari in this case and reverse the decision of the Supreme Court of Virginia for three reasons:

1. The decision of the Supreme Court of Virginia is in conflict with the reasoning of Eddings v. Oklahoma, 455 U.S. 102 (1981), in that the instructions gave the jury discretion to refuse to consider mitigating evidence of the defendant's character and record and possibly precluded them from doing so, if they did not understand that the punishment in a capital case must fit the individual defendant, as well as the crime. See California v. Brown, 107 S.Ct. at 842 (O'Connor, J. concurring).

2. This case will provide a perfect vehicle to resolve the conflicts between the lower federal and state courts about what a capital sentencing jury must be told to ensure that they will comply with Eddings and related cases. When a rule of criminal procedure derived from the constitution "'is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law,'" it must be incorporated into the instructions to the jury. Taylor v. Kentucky, 436 U.S. 478, 483 (1977) (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)). A capital sentencing trial without an adequate jury instruction about the duty to consider mitigating circumstances is as unthinkable as a guilt trial without adequate instructions about the standard of proof beyond a reasonable doubt and the presumption of innocence. Differences between capital sentencing statutes and individual cases must, of course, be taken into account, but there is an obvious need for a uniform constitutional standard that can be applied consistently to jury instructions about mitigating circumstances in every case and in every state.

3. The decision of the Supreme Court of Virginia resulted in fundamental unfairness to Petitioner, which may not be corrected at all if it is not corrected here. The Fourth Circuit will not engage in "detailed scrutiny of state jury instructions" about mitigating circumstances in federal habeas corpus proceedings. Briley v. Bass, 750 F.2d at 1244. If Petitioner pursues this issue in federal collateral proceedings in the Fourth Circuit, that court may find a way to affirm his death sentences, in spite of the blatant constitutional error.

ARGUMENT

A.

THERE IS AN UNACCEPTABLE RISK THAT THE JURY DID NOT PERFORM ITS EIGHTH AMENDMENT OBLIGATION TO CONSIDER ALL OF THE MITIGATING CIRCUMSTANCES BECAUSE THE JURY INSTRUCTIONS DID NOT CALL MITIGATING CIRCUMSTANCES TO THEIR ATTENTION IN ANY MANNER.

Individualized consideration of mitigating aspects of the defendant's character and record or the circumstances of the offense is a "constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (opinion of Stewart, Stevens and Powell, JJ.). "It could not be clearer" that the jury instructions in the present case allowed the jury to dispense with consideration of the significant mitigating evidence that was proffered because the instructions did not bring this evidence to the attention of the jury or inform them of their constitutional obligation to

consider it. See Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 1824 (1987).

This Court has derived several discrete rules from the Eighth Amendment doctrine of individualized consideration of any mitigating "factors which may call for a less severe penalty" in a capital case. See Lockett v. Ohio, 438 U.S. 586, 605 (1978). The terms of art "mitigating evidence" and "mitigating circumstances" have a fixed constitutional meaning. Mills v. Maryland, ___ U.S. ___, 108 S.Ct. 1860, 1865 (1988). The trial court cannot exclude relevant mitigating evidence by using a different definition of that constitutional term of art. Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 1671 (1986). The defendant must be permitted to "present to the (sentencer) any and all mitigating evidence." Franklin v. Lynaugh, ____ U.S. ____, 108 S.Ct. 2320, 2326 (1988) (plurality opinion). The sentencer must not be precluded, as a matter of law, from considering any mitigating evidence, Hitchcock v. Dugger, 107 S. Ct. at 1824, or from giving it independent weight. Penry v. Lynaugh, ___ U.S. ___, 1989 WL 67223 (U.S.). The sentencer "may not refuse to consider" any part of the mitigating evidence that the defendant proffers. Eddings v. Oklahoma, 455 U.S. 104, 114 (1981).

The Court has "gone far in establishing a constitutional entitlement" to the enforcement of each of these Eighth Amendment rules. Franklin v. Lynaugh, 108 S. Ct. at 2331 (plurality opinion). Under the Court's precedents, a death sentence must be vacated when there was "a substantial risk" that the sentencing jury or judge was "misinformed" about one or more of these separate requirements of the Eighth Amendment. Mills v. Maryland, 108 S. Ct. at 1869.

When a jury is given the "awesome power" to decide whether the defendant will be sentenced to death or life in prison, Franklin v. Lynaugh, 108 S. Ct. at 2330 (plurality opinion), a reviewing court must rely on "the verdict form and the judge's instructions" to determine whether all of the requirements of the Eighth Amendment were satisfied. Mills v. Maryland, 108 S. Ct. at 1869. "There is, of course, no extrinsic evidence of what the jury . . . actually" considered. Id. Since Eddings v. Oklahoma, 455 U.S. at 114, teaches that a reviewing court may not presume that all of the mitigating evidence proffered was actually considered, careful scrutiny of the jury instructions and verdict form is the only alternative to an unconstitutional presumption of regularity. See Franklin v. Lynaugh, 108 S. Ct. at 2331 (plurality opinion) (death sentence is not rationally reviewable if jury instructions provided no guidance about consideration of mitigating evidence). In "the absence of instructions informing the jury" of their duty to "consider and give effect to the mitigating evidence," the risk of an erroneous death sentence is constitutionally intolerable. See Penry v. Lynaugh, 1989 WL 67223 (U.S.) at 37.

When this Court has scrutinized jury instructions about mitigating circumstances, it has always focused on whether the instructions affirmatively precluded consideration of a mitigating aspect of the defendant's character and record or the circumstances of the offense. See, e.g., Penry v. Lynaugh, 1989 WL 67223 (U.S.) at 37; Mills v. Maryland, 108 S. Ct. at 1868; Franklin v. Lynaugh, 108 S. Ct. at 2323-32 (plurality opinion); Hitchcock v. Dugger, 107 S. Ct. at 1824; California v. Brown, 479 U.S. 538, 107 S. Ct. 837, 838-840 (1987). But it is clear that the Eighth Amendment is also violated when an unguided jury inadver-

tently adopts an unconstitutional definition of mitigating circumstances or refuses to consider them, as the sentencing judge did in Eddings v. Oklahoma, 455 U.S. at 113; see also Hitchcock v. Dugger, 107 S. Ct. at 1824.

In the present case, mitigating circumstances were not defined for the jury with synonyms or specific examples and the jury was not told "of its obligation to consider all of the mitigating evidence introduced" by the defendant. See California v. Brown, 107 S. Ct. at 842 (O'Connor, J., concurring). The words "mitigating circumstances" and "mitigating evidence" were not even mentioned in the instructions. The verdict form states that the jury considered any evidence "in mitigation of the offense," but it does not provide a clue about the jury's understanding of that legal term of art.

A reviewing court could not conclude from these instructions and the verdict form that the juries in petitioner's two capital sentencing trials adopted a constitutional definition of mitigating evidence. "While juries indeed may be capable of understanding the issues posed in capital sentencing proceedings, they must first be properly instructed" about them. Mills v. Maryland, 108 S. Ct. at 1867, n.10; accord, Franklin v. Lynaugh, 108 S. Ct. at 2331 (plurality opinion) (and cases cited therein). It was "virtually unthinkable" to allow a jury of laymen to choose between life and death without "careful instructions on the law and how to apply it." Gregg v. Georgia, 428 U.S. 153, 193 (1976). "A reasonable juror may not" have understood the meaning of the "legalistic term" that appeared on the verdict form. See Peek v. Kemp, 784 F.2d 1479, 1490 (11th Cir. 1986) (en banc); see also California v. Brown, 107 S. Ct. at 839, citing, Francis v. Franklin, 471 U.S. 307, 315-16 (1985); cf. Penry v. Lynaugh, 1989 WL 67223

(U.S.) at 30-31 ("in the absence of jury instructions defining 'deliberately,'" Texas jury may have believed that it did not have to consider some of the mitigating evidence).

If the jury paid serious attention to the verdict form and they considered any "evidence in mitigation of the offense," there is still an unacceptable risk that they did not understand that aspects of petitioner's character and record also constituted mitigating evidence.[1] Justice O'Connor put her finger on the problem in her concurring opinion in California v. Brown. The jury in that case was instructed to consider a list of statutory mitigating circumstances and any "other circumstance which extenuated the gravity of the crime though it is not a legal excuse." 107 S. Ct. at 842. Justice O'Connor said that this instruction was not sufficient to ensure that the jury considered non-statutory mitigating aspects of the defendant's character and record, although it clearly required consideration of any mitigating circumstances of the crime. Id. The verdict form in this case was similar to the language in the jury instruction that Justice O'Connor criticized in Brown.

Eddings v. Oklahoma also demonstrates why one sentence of boilerplate on the verdict form did not ensure that the jury included petitioner's character and record in

---

[1] The jury instructions required "consideration of his prior history" for the purpose of determining whether the statutory aggravating circumstance of future dangerousness was proved. Some of the mitigating evidence of his character and record may have been relevant to this issue, but most of its mitigating value was lost if it was only considered for that narrow purpose. Penry v. Lynaugh, 1989 WL 67223 (U.S.) at 26-37; Franklin v. Lynaugh, 108 S. Ct. at 2333 (O'Connor and Blackmun, JJ. concurring). The instruction about the issue of future dangerousness could have converted the mitigating evidence of drug abuse into an aggravating factor. Penry v. Lynaugh, 1989 WL 67223 (U.S.) at 31-32.

the definition of mitigating evidence that they used to determine whether he would live or die. In Eddings, the sentencing judge mistakenly believed that he was precluded, as a matter of law, from considering the defendant's troubled family history and youth as mitigating circumstances, although Oklahoma law permitted consideration of "any mitigating circumstances." 455 U.S. at 106. Since the members of the jury in petitioner's trials were "unlikely to be skilled in dealing with the information" that was presented to them, Gregg v. Georgia, 428 U.S. at 192, it was easier for them to make the same mistake. Like the judge in Eddings, they could have wrongly assumed that the punishment had to fit the crime, rather than the individual whose life they held in their hands.

This is not to say that the Eighth Amendment required a general definition of mitigating circumstances. As the Eleventh Circuit recognized in Peek v. Kemp, 784 F.2d at 1485-94, there are a number of different devices that can be used in instructions to communicate the constitutional meaning of mitigating circumstances to the jury. As the Supreme Court of Virginia recognized in Waye v. Commonwealth, 219 Va. 683, 251 S.E.2d 202, 212 and n.4 (Va. 1979), jury instructions about rules of state law must be considered in determining whether the instructions, as a whole, communicated what the Eighth Amendment requires. While the Eighth Amendment does not impose a formula for instructing the jury about mitigating circumstances, it does require instructions that bring the mitigating evidence to the attention of the jury. Zant v. Stephens, 462 U.S. at 876, n.13. The jury instructions in the present case did not include any device that could have informed the jury about their constitutional duty to consider any aspects of petitioner's character and

record that independently called for a life sentence, as well as any mitigating circumstances of the offense.

Furthermore, if the jury understood the constitutional definition of mitigating evidence without any help from the court, there is still an unacceptable risk that they simply refused to give it the kind of consideration that the Eighth Amendment requires. The instruction told the jury to consider all of the evidence in deciding whether a death sentence was justified. They could have followed this instruction and still refused to consider whether the mitigating circumstances independently called for a life sentence. See Lockett v. Ohio, 438 U.S. 586, 604 (1978).

Taylor v. Kentucky, 436 U.S. 478 (1977), illustrates by analogy why it was critical for the instructions to remove this ambiguity. In Taylor v. Kentucky, the Court held that a defendant is entitled to a jury instruction about the presumption of innocence, as well as an instruction about the standard of proof beyond a reasonable doubt. The Court explained that "the ordinary citizen" may not understand the difference between these two "logically similar" legal concepts. 436 U.S. at 477. The same need for "significant additional guidance" existed here. See Id. An unguided jury cannot be expected a comprehend the subtle difference between considering whether all of the evidence justifies a death sentence, as the jury did here, and individualized consideration of mitigating evidence of the defendant's character and record that independently calls for a less severe penalty.

This concept is fundamental law, just as the presumption of innocence "'is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.'" See Taylor v. Kentucky, 436 U.S. at 483 (quoting Coffin v. United States,

156 U.S. 432, 453 (1895)). Half of this Court's contemporary capital punishment jurisprudence would be unnecessary, if there is no constitutional difference between "unguided discretion not to impose" the death penalty after finding at least one statutory aggravating circumstance, Penry v. Lynaugh, 1989 WL 67223 (U.S.) at 82 (dissent), and an obligation to give "full consideration . . . to any mitigating evidence" that calls for a life sentence. Id., at 37 (majority opinion); see also California v. Brown, 107 S. Ct. at 839-842 (plurality opinion).

In the present case, the jury was given adequate guidance about the aggravating factors that the State "deems particularly relevant" in deciding whether petitioner was eligible for a death sentence, Gregg v. Georgia, 428 U.S. at 193, but it was not given any guidance about the reasons why "it should not be imposed." See Jurek v. Texas, 428 U.S. 262, 271 (1976). In this important respect the instructions suffered from the same constitutional defect as the arbitrary procedure that was condemned in Furman v. Georgia, 408 U.S. 183 (1971). See Penry v. Lynaugh, 1989 WL 67223 (U.S.) at 36-37.

Of course, there is a possibility that the uninformed jury adopted a constitutional definition of mitigating circumstances and considered all of the mitigating evidence. Defense counsel called the mitigating circumstances to the attention of the jury in his inartful summations. However, the jury could have agreed with the prosecutor's contention that the mitigating circumstances were merely a "good argument." See Penry v. Lynaugh, 1989 WL 67223 (U.S.) at 34-35 ("In light of prosecutor's argument, and in the absence of appropriate jury instructions," jury may not have considered mitigating evidence).

In "'death cases doubts such as those presented here should be resolved in favor of the accused.'" Mills v. Maryland, 108 S. Ct. at 1867 (quoting Andres v. United States, 333 U.S. 740, 752 (1948)). Counsel's "arguments cannot substitute for instructions by the court" under any circumstances. Taylor v. Kentucky, 436 U.S. at 477-78; accord Bell v. Watkins, 692 F.2d 999, 1012, n. 13 (5th Cir. 1982) (arguments about mitigating circumstances no substitute for instructions). When "jury consideration of mitigating evidence" is "unfocused or undirected," as it was here, and the jury's exercise of its unbridled discretion is not "rationally reviewable," a death sentence cannot "pass constitutional muster." Franklin v. Lynaugh, 108 S.Ct. at 2331 (plurality opinion); accord Penry v. Lynaugh, 1989 WL 67223 (U.S.) at 81-82 (dissent).

Here, as in Skipper v. South Carolina, 106 S. Ct. at 1673, the Eighth Amendment violation was "sufficiently prejudicial" to constitute reversible error "under any standard." Petitioner proffered significant mitigating evidence of his character and record in the sentencing phase of both of his trials. His youth, employment history, participation in church activities, upbringing without a father, his positive relationships with his family and friends, and his drug problem were precisely the kind of mitigating circumstances that an inadequately instructed jury may overlook or refuse to consider. See Franklin v. Lynaugh, 108 S. Ct. at 2333 (O'Connor and Blackmun, JJ. concurring); California v. Brown, 107 S. Ct. at 841-842 (O'Connor, J. concurring). The substantial possibility that the jury overlooked or refused to consider part or all of this classic mitigating evidence "is one that we dare not risk." Mills v. Maryland, 108 S. Ct. at 1870. This is especially true in a Virginia case, where the court was required to impose a life sentence if a single juror refused to vote for the death penalty. See Va. Code § 19.2-264.4.

In short, because the jury was not "adequately informed of its obligation to consider all of the mitigating evidence," there is an unacceptable risk that petitioner was sentenced to death in spite of factors that called for a less severe penalty. See California v. Brown, 107 S. Ct. at 842 (O'Connor, J. concurring).

B.

THIS COURT CAN REACH THE MERITS OF PETITIONER'S EIGHTH AMENDMENT CLAIM BECAUSE THE SUPREME COURT OF VIRGINIA DID NOT PLAINLY STATE OR EVEN SUGGEST THAT ITS DECISION RESTS UPON AN ADEQUATE AND INDEPENDENT STATE GROUND.

The Court can grant certiorari in this case and reach the merits of petitioner's Eighth Amendment challenge to the jury instructions because the opinion of the Supreme Court of Virginia does not contain a "'plain statement' that (its) decision rests upon adequate and independent state grounds." Michigan v. Long, 463 U.S. 1032, 1043 (1983). Assuming that there was merit to the state's argument that the claim was either res adjudicata or procedurally defaulted, this Court must still presume, in the absence of a plain statement to the contrary, that the Supreme Court of Virginia reached the merits of the federal question, as petitioner urged. Harris v. Reed, ____ U.S. ____, 109 S. Ct. 1038, 1043-44 (1989).

It is now well-settled that "the mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent this Court from reaching the federal claim." Harris v. Reed, 109 S. Ct. at 1042. A "procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case" made a plain statement in a written opinion that its judgment rests on a state procedural bar. Id. at 1043. A federal court should not consider "whether procedural default was argued to the state court" when the state court's opinion does not include

a plain statement. Id., at 1044. The federal court should not examine the state court record, state statutes and other state court cases to determine the meaning of an ambiguous state court opinion. Id.

In the present case, petitioner made five assignments of error in his consolidated petition to appeal to the Supreme Court of Virginia. In assignment of Error IV, he argued that the jury instructions in the sentencing phase of both of his trials violated the Eighth Amendment because they did not require consideration of mitigating circumstances. The state argued in response to this assignment of error that the same claim was decided on direct appeal or, in the alternative, procedurally defaulted because it was not raised on direct appeal. The Supreme Court of Virginia did not mention assignment of Error IV in its opinion. The opinion included a plain statement that assignments of Error I and II were decided on adequate and independent state law grounds. Without referring to assignment of Error IV, it also stated that "there is no reversible error in the judgment complained of."

The judgment of the Supreme Court of Virginia is a decision on the merits of all of the claims raised in the petition for appeal. Saunders v. Reynolds, 214 Va. 697, 204 S.E.2d 421 (1974). When the Supreme Court of Virginia simply holds that there was no reversible error in the judgment of a Circuit Court, as it did here, the Supreme Court's judgment may rest on federal grounds or on adequate and independent state law grounds. Hargrave v. Landon, 584 F. Supp. 302, 309-10 (E.D. Va.), aff'd 751 F.2d 379 (4th Cir. 1984). The Supreme Court of Virginia clearly had the power to decide the Eighth Amendment claim in assignment of Error IV on federal grounds, in spite of any state procedural bar. Tweety v. Mitchell, 682 F.2d 461, 463 (4th Cir. 1982) (and Virginia cases cited therein).

When "a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in state court," as it did here, a federal court is free to decide the federal claim on its merits, Smith v. Digmon Warden, 434 U.S. 332, 333 (1978), unless it can be said that the state court invoked a state procedural bar with its silence. Martinez v. Harris, 675 F.2d 51, 54 (2d Cir. 1982). If a state court's silence about a federal claim can ever be treated as an unspoken intent to invoke a state procedural bar, the silence of the Supreme Court of Virginia about assignment of Error IV cannot be construed as such here. Compare Harris v. Reed, 109 S. Ct. at 1041.

The written opinion of the Supreme Court of Virginia is the only source of evidence that can be considered here in deciding whether that court's decision rests on an adequate and independent state law ground. Harris v. Reed, 109 S. Ct. at 1043-44. There is nothing in the opinion to indicate that the court relied on a state procedural ground when it decided assignment of Error IV. The written orders of the Circuit Court are irrelevant because it was not the last state court to review the jury instructions claim. Harris v. Reed, 109 S. Ct. at 1043. The state's res adjudicata and procedural default arguments are irrelevant, even if they had merit. Harris v. Reed, 109 S. Ct. at 1044. Any consideration of state statutes, state court rules or state court decisions in other cases is also forbidden. Id.

The rationale of Harris v. Reed applies with even greater force in a case like this one, where the state court's opinion was completely silent about the basis for its decision on the federal claim. In Harris v. Reed, the state court's opinion provided some indication of what the state court was thinking, although it was not a plain statement. This Court nevertheless held that it did not have enough information to avoid speculation. 109 S. Ct. at

1045. In the present case, there is no evidence at all of what the Supreme Court of Virginia was thinking when it silently rejected assignment of Error IV, without mentioning it by name. Speculation could not be avoided here, even if this Court was willing to undertake the substantial burden of analyzing the briefs, state law and the state court record. See Harris v. Reed, 109 S. Ct. at 1044.

Other federal courts have refused to find that a state court relied on an adequate and independent state law ground when it silently rejected a federal claim. The Third Circuit held in a civil case that "the unfortunate fact that appellate courts no longer have the luxury of writing an opinion in every case does not change settled precepts" about the power of a federal court to decide a federal question. Super Tire Engineering v. McKorkle, 550 F.2d 903, 908 (3d Cir. 1977). This approach is consistent with Harris v. Reed. Similarly, in Thacker v. State of South Carolina, 438 F. Supp. 447, 451-52 (D. S.C. 1977), a federal habeas corpus case, the federal court reached the merits of a defaulted claim where the last state court to consider it did not set forth any basis for its judgment. This approach was also consistent with Harris v. Reed.

The Second Circuit has presumed in federal habeas corpus cases that a silent state court decision was based on procedural default when the claim was, in fact, defaulted and the state argued procedural default in state court. Martinez v. Harris, 675 F.2d at 54. This approach is in conflict with Harris v. Reed, 109 S. Ct. at 1043-44, because it requires an examination of state procedural law and the state court record.

The Fourth Circuit has approved of the same approach in dictum in a federal collateral proceeding. Tweety v. Mitchell, 662 F.2d at 463-464. In Hargrave v. Landon, 584 F. Supp. at 309-10, the court relied on the dictum in Tweety v. Mitchell for the proposition that a federal habeas

court will presume that the Supreme Court of Virginia relied on a state procedural ground when its opinion in a state habeas proceeding merely stated that there was "no reversible error," the attorney general argued in state court that the claim was procedurally barred and there was, in fact, a procedural default. These Fourth Circuit cases are clearly at odds with Harris v. Reed.

Even if the cases of the Second and Fourth Circuits were correctly decided and they can be distinguished from Harris v. Reed, this Court can still reach the merits of petitioner's Eighth Amendment challenge to the jury instructions. In Rosenfeld v. Dunham, 820 F.2d 52, 54 (2d Cir. 1987), the Second Circuit held that there was no state procedural bar where the district attorney argued procedural default in state court, there was, in fact, a procedural default, the state court's opinion addressed one of several claims on its merits and disposed of the defaulted claim by stating

> we have considered the defendant's remaining contentions and find that they do not merit reversal.

Petitioner's case is nearly identical to Rosenfeld v. Dunham. The Supreme Court of Virginia plainly stated in its opinion in his case that it decided assignments of Error I and II on state procedural grounds. Assignments of Error III, IV and V were not mentioned by name, but these claims were necessarily disposed of with the statement, "there is no reversible error in the judgment complained of." Under the rule of Rosenfeld v. Dunham, this statement must be construed as a decision on the merits of the federal claim in assignment of Error IV, even if a state court's silence can be construed as invoking a procedural bar in other circumstances.

Furthermore, if the Virginia Supreme Court wanted to decide the jury instructions claim in assignment of Error IV on the grounds of res adjudicata or procedural default, it would have made a plain statement to that effect,

as it did with assignments of Error I and II. If the court's silent treatment of assignment of Error IV says anything about the basis for its judgment on that claim, it must mean that the court did no rely on the state procedural grounds that it cited as the basis for its judgment on assignments of Error I and II.

Finally, it would be fundamentally unfair to find a state procedural bar in this capital case. Procedural defaults can have deadly consequences for state prisoners in capital cases. Smith v. Murray, 477 U.S. 527 (1986). In a capital case, the plain statement rule has the salutory effect of compelling state courts to give thoughtful consideration to the enforcement of rules of procedure that can insulate unjust and illegal death sentences from federal review. This Court has broadly construed its power to decide federal questions in capital cases where the state urged the Court to find an adequate and independent state law ground. See, e.g., Johnson v. Mississippi, ___ U.S. ___, 108 S.Ct. 1981 (1988); Caldwell v. Mississippi, 472 U.S. 320, 327 (1985); Ake v. Oklahoma, 470 U.S. 68, 74-75 (1985); Reece v. Georgia, 350 U.S. 85 (1955); see also Williams v. Georgia, 349 U.S. 375 (1955); Patterson v. Alabama, 294 U.S. 600 (1935). If there is any doubt about the existence of a state procedural bar here, these precedents require that it be resolved in petitioner's favor.

Justice O'Connor's concurring opinion in Eddings v. Oklahoma decisively answers any other procedural argument that the Commonwealth of Virginia might make in opposition to this petition for certiorari:

> Because the . . . failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence in plain violation of Lockett,

simple justice requires that this Court use its full authority to correct the Eighth Amendment error, even if there is some ambiguity about whether the state court decided the merits of the claim. 455 U.S. at 117, n.*. The Court

should therefore grant the petition for a writ of certiorari, reverse the judgment of the Supreme Court of Virginia and remand the case for resentencing.

CONCLUSION

The Supreme Court of Virginia overlooked or ignored a fundamental requirement of this Court's contemporary capital punishment jurisprudence when it summarily rejected Petitioner's Eighth Amendment challenge to the jury instructions. Plenary consideration of this claim would enable the Court to provide badly needed guidance about what a capital sentencing jury must be told to ensure that they will perform their constitutional obligation to consider all of the mitigating evidence. On the other hand, the constitutional error was so blatant here that it would also be appropriate to summarily reverse the judgment of the Supreme Court of Virginia. In either case, Petitioner prays this Court to grant certiorari and decide the issue on its merits.

JOHNNY WATKINS

By Counsel

STEVEN C. LOSCH
162 Terrace Place
Brooklyn, N.Y. 11218
212-577-7952
718-499-7756

APPENDIX A

E.L. Motley, Jr., Danville, (Henry G. Crider, Danville, on brief), for appellant in No. 841913.

Frank S. Ferguson, Asst. Atty. Gen. (Gerald L. Baliles, Atty. Gen., on brief), for appellee in No. 841913.

Present: All the Justices.

COCHRAN, Justice.

A jury found Johnny Watkins, Jr. (Watkins), guilty of the capital murder of Betty Jean Barker on November 14, 1983, in the commission of robbery while armed with a deadly weapon. The jury also found Watkins guilty of the robbery itself and use of a firearm in the commission of a felony and fixed his punishment for these two offenses at confinement in the penitentiary for life and for two years, respectively. In the bifurcated proceeding mandated by Code §§ 19.2-264.3 and -264.4, the jury fixed Watkins's punishment for capital murder at death, based upon findings of Watkins's future dangerousness and the vileness of the crime. After considering the probation officer's report filed pursuant to § 19.2-264.5, the trial court by final order entered July 13, 1984, sentenced Watkins in accordance with the jury verdicts.

In a subsequent trial, another jury found Watkins guilty of three offenses, the capital murder of Carl Douglas Buchanan on November 22, 1983, in the commission of robbery while armed with a deadly weapon, the robbery itself, and use of a firearm in the commission of a felony. The jury fixed his punishment for robbery and use of a firearm at confinement in the penitentiary for life and for two years, respectively. Based upon findings of Watkins's future dangerousness and the vileness of the crime, the jury fixed his punishment for capital murder at death. After considering the probation officer's report, the trial court by final order entered September 28, 1984, sentenced Watkins in accordance with the jury verdicts.

In each of the capital murder cases, we have consolidated the automatic review of the death sentence with Watkins's appeal from his conviction and have given them priority on our docket. Although the two cases were briefed and argued before us independently of each other, they raised many common issues. Accordingly, we are using the format of one opinion in which to incorporate our views on all issues.[1]

I. Facts.

A. Barker Murder.

On November 13, 1983, Betty Jean Barker reported for work as clerk at a Kwik Stop convenience store about 11:00 p.m. At 2:45 a.m. on November 14, a customer departed after paying her for gasoline. About 3:15 a.m. other customers found the clerk, apparently dead, lying on the floor behind the cash register, the drawer of which was open. The life saving crew, when called to the scene, confirmed that Barker was dead. An autopsy established that she had been struck by three bullets, one in the right cheek, one in the upper right chest, and one in the upper left chest. The fatal shot, which perforated the lungs and aorta, was the one in the upper right chest. A fourth bullet, found in the victim's sweater, had not wounded her.

Quentin Nash was the principal witness for the Commonwealth. As an accomplice of Watkins, he had been convicted of the crimes but had not been sentenced. Nash testified that he and Watkins left a card game about 1:20 a.m. on November 14 in Watkins's car. Watkins said he was tired of being "broke" and was going to "rob a place," and then said he was going to the Kwik Stop market to "rob that place." Nash agreed to act as a lookout. They arrived at the Kwik Stop about 2:40 a.m., purchased gas, but then drove across the street because there were other customers in the store. At 3:00 a.m., when they saw the clerk was alone, they returned; Watkins entered the store while Nash remained in the car. Nash, reconsidering the proposed robbery, went in to persuade Watkins not to commit the crime. Watkins, however, had purchased cigarettes. When Barker opened the cash register, Watkins shot her twice, causing her to fall to the floor. Watkins ordered Nash to take the cash register. As Nash ran from the premises with the cash drawer, he saw Watkins leaning over the counter with the firearm in his hand. When Watkins returned to the car, the men left the scene of the crimes. Nash testified that he refused to accept from Watkins any of the money obtained in the robbery. It was established that the amount of $89.89 had been taken by the robbers.

In their investigation of the Buchanan murder, the police found a .22-caliber pistol in a jacket belonging to Watkins. There was uncontradicted expert testimony that one of the bullets removed from Barker's body had been fired from this pistol.

B. Buchanan Murder.

In the early morning hours of November 22, 1983, Carl Douglas Buchanan was the sole employee working at Fast Fare, a convenience store. It was established that he was alive about 1:30 a.m. A customer who entered the store between 1:45 and 1:50 a.m. observed the cash register open and the money drawer missing. Looking behind the counter, he found Buchanan's body. The police ascertained that there was missing from the cash register the sum of $34.73, including a $2.00 bill whose serial number had been recorded. Local merchants were notified of the existence of this bill. Later on November 22, Darnell Watkins (Darnell), Watkins's brother, was identified as the person who had tendered the bill that day in paying a store account.

Obtaining a search warrant for Darnell's apartment, the police discovered that the brothers shared a bedroom. The officers found in a jacket in their bedroom credit cards, a driver's license, and other items belonging to Carl Buchanan. In another jacket bearing Watkins's employee identification badge, they found eight empty cartridges and a .22-caliber pistol loaded with six live bullets.

Darnell was the principal witness for the Commonwealth. He admitted his participation in the crimes, for which he had been convicted but not sentenced.

Darnell testified that about midnight on November 21, his brother offered to drive him to a store for cigarettes. On the way, Watkins said, "I might rob some place." After finding one store closed, they proceeded to Fast Fare, which Watkins entered while Darnell remained in the car. No other customers were in the store. Darnell saw his brother point a weapon at the clerk, saw the clerk fall backward, and saw Watkins go to the other side of the counter and take the cash drawer from the cash register. Hearing two shots, Darnell observed Watkins bending down behind the counter. When Watkins returned to the car with the cash drawer and a wallet, he drove away with his brother. Darnell asked Watkins if he had shot the clerk; Watkins replied that he had shot him three or four times in the head and chest. Watkins told Darnell the wallet contained about $40. From the proceeds of the robbery he gave Darnell $42 in repayment of a loan.

Darnell also testified that his brother later attempted to persuade him to accept responsibility for the robbery while Watkins accepted responsibility for the murder under the belief that such separation of guilty conduct would enable Watkins to avoid execution. This testimony was corroborated by a relative in whose apartment the brothers lived.

An autopsy established that Carl Buchanan had been struck by four bullets, one near the left temple, one in the left upper chest, one in the left mid-chest, and one in the right lower back. Either of the chest wounds would have been fatal. The uncontradicted expert testimony was that one of the bullets removed from Buchanan's chest had been fired from the .22-caliber pistol found in Watkins's jacket.

II. Pretrial Proceedings.

A. Barker Murder.

1. Motion to Suppress.

Watkins made a pretrial motion to suppress statements given by him to the po-

1. Watkins's convictions in each case of robbery and use of a firearm in the commission of a felony are not before us in these appeals.

lice. Testimony at the suppression hearing revealed that both Darnell and Watkins were taken to Danville Police headquarters following the search of their apartment on November 22. About 11:00 p.m. the same day, police interrogated Watkins. He was first advised of his constitutional rights as required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), after which he signed a written waiver of his rights. During questioning, when Watkins stated he wanted to see a lawyer, the interrogation terminated. An officer reduced to writing Watkins's responses during this interview, but Watkins refused to sign the statement.

About 1:00 a.m., Watkins was informed he was being charged with capital murder. He asked why he was being charged. Before giving any explanation, an officer again advised him of his constitutional rights and Watkins executed a second written waiver of his rights. He was then told that Darnell had implicated him in the murder and robbery of Carl Buchanan at the Fast Fare market. When Watkins expressed disbelief, police played for him a portion of Darnell's recorded statement. At Watkins's request, he was allowed to see his brother, and a police officer testified that Watkins asked Darnell, "Did you really snitch on me?" According to the officer, Darnell admitted that he had done so. Watkins then declined to talk about the shooting or take a polygraph test, saying that he wanted "to think about it."

On the morning of November 28, another officer went to the jail to question Watkins further. Watkins was advised of his *Miranda* rights a third time and signed a third waiver form. The officer testified that Watkins said he wanted to talk about the incident. The officer then reduced to writing a statement in which Watkins admitted having shot Buchanan with a pistol he had purchased in 1983 but claimed he shot in self-defense. He signed each page of this statement. The officer said Watkins was cooperative and showed no hesitation in making the statement. The officer made no promises or representations to Watkins to induce the statement, and Watkins never indicated he wanted to stop the questioning or consult with a lawyer. The meeting lasted about 15 minutes.

Watkins testified that he did not simply start telling what he knew at this third interview. Instead, he said he asked for an attorney but the officer ignored his request. He also said the officer informed him it would be better if he told the truth because Darnell had already revealed to the police what happened. Watkins conceded he signed the waiver which contained the statement, "I do not want a lawyer at this time." He said he continued to answer the officer's questions "to be polite" and because the officer kept "nagging" him.

The trial court held that Watkins's statements were given freely, voluntarily, and intelligently, without coercion, threat, or promise, and after he was properly advised of his rights. The November 28 statement about the Buchanan killing was then offered and admitted only in the penalty phase of Watkins's trial for the Barker murder. Defendant argues that this statement was not voluntary because he was entitled to stop the questioning at any time but the officer's persistence resulted in his being denied this right.

[1, 2] Admissibility of a defendant's statements is an issue to be decided by the court, which evaluates the credibility of the witnesses, resolves any conflicts in the testimony, and weighs the evidence as a whole. *Stockton v. Commonwealth*, 227 Va. 124, 140, 314 S.E.2d 371, 381, *cert. denied*, 469 U.S. —, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984); *Witt v. Commonwealth*, 215 Va. 670, 674, 212 S.E.2d 293, 297 (1975). The court must decide whether the defendant knowingly and intelligently relinquished and abandoned his rights. *Wyrick v. Fields*, 459 U.S. 42, 47, 103 S.Ct. 394, 396, 74 L.Ed.2d 214 (1982); *Washington v. Commonwealth*, 228 Va. 535, 547–48, 323 S.E.2d 577, 586 (1984), *cert. denied*, 471 U.S. —, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985); *Bunch v. Commonwealth*, 225 Va. 423, 433, 304 S.E.2d 271, 276, *cert. denied*, 464 U.S. 977, 104 S.Ct. 414, 78 L.Ed.2d 352 (1983). The court's determination is a question of fact based on the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938); *Jones v. Commonwealth*, 228 Va. 427, 441, 323 S.E.2d 554, 561 (1984); *Washington*, 228 Va. at 547–48, 323 S.E.2d at 586; *Bunch*, 225 Va. at 433, 304 S.E.2d at 276. This factual finding will not be disturbed on appeal unless plainly wrong. *Jones*, 228 Va. at 441, 323 S.E.2d at 561; *Stockton*, 227 Va. at 140, 314 S.E.2d at 381.

[3] The trial court was in a position to evaluate the credibility of the witnesses in accepting the testimony of the officer and rejecting the conflicting testimony of Watkins on the waiver question. The waiver signed by Watkins indicates he did not seek counsel. Watkins himself testified that he understood his rights, that he could read well, and that he had previously been advised of his rights twice in unrelated matters and twice in the preceding week relative to the Barker and Buchanan murders. He admitted he knew he did not have to give a statement without a lawyer present but voluntarily gave the statement when he realized the officer would keep "nagging" him. We hold that the evidence in the record is sufficient to justify the factual determination by the trial court that Watkins's statement was voluntarily given. *See Bunch*, 225 Va. at 434, 304 S.E.2d at 277; *Clark v. Commonwealth*, 220 Va. 201, 208–09, 257 S.E.2d 784, 788–89 (1979), *cert. denied*, 444 U.S. 1049, 100 S.Ct. 741, 62 L.Ed.2d 736 (1980).

2. Other Pretrial Motions.

[4] Watkins asked the court to appoint an investigator to assist in the preparation of his defense. The trial court denied the motion. We affirm this ruling. We have held that an indigent defendant has no constitutional right under the Due Process or Equal Protection clauses to appointment, at public expense, of a private investigator. *See Stockton*, 227 Va. at 140–41, 314 S.E.2d at 382; *Quintana v. Commonwealth*, 224 Va. 127, 135, 295 S.E.2d 643, 646 (1982), *cert. denied*, 460 U.S. 1029, 103 S.Ct. 1280, 75 L.Ed.2d 501 (1983); *Martin v. Commonwealth*, 221 Va. 436, 446, 271 S.E.2d 123, 130 (1980).

[5] Watkins contends, however, that failure to appoint an investigator to assist in his defense violated his Sixth Amendment rights. Citing no authority, he equates the advantage of having the assistance of an investigator to the right to compulsory process for obtaining witnesses and the right to assistance of counsel expressly guaranteed by the Sixth Amendment. The Sixth Amendment does not mandate appointment of an investigator, however, and we will not infer such a requirement from the clear language of the Amendment which outlines the constitutional prerequisites for criminal prosecutions. As the Supreme Court has stated in another context, "the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required." *Ross v. Moffitt*, 417 U.S. 600, 616, 94 S.Ct. 2437, 2447, 41 L.Ed.2d 341 (1974).

Watkins also moved for discovery of the names and addresses of all potential witnesses for the Commonwealth. The motion was denied. Although Watkins conceded in pretrial argument on the motion that there is no existing authority requiring the Commonwealth to provide this information, he contends that failure to allow such discovery violates the Sixth Amendment. He based his pretrial argument on the right to assistance of counsel; on appeal, he argued denial of the right to be confronted with the witnesses against him.

[6] There is no constitutional right to discovery in a criminal case. *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 845, 51 L.Ed.2d 30 (1977). Nor does the prohibition of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), against concealing exculpatory evidence create a constitutional requirement that the prosecution furnish the names of its wit-

nesses before trial. *Weatherford*, 429 U.S. at 559, 97 S.Ct. at 845; *see Lowe v. Commonwealth*, 218 Va. 670, 679, 239 S.E.2d 112, 118 (1977), *cert. denied*, 435 U.S. 930, 98 S.Ct. 1502, 55 L.Ed.2d 526 (1978) (Rule 3A:11, formerly Rule 3A:14, providing for discovery in criminal cases, does not require Commonwealth to provide names and addresses of witnesses). The trial court properly denied the discovery motion.

On the morning of trial, Watkins argued two motions relating to the selection of the jury. First, he sought to have separate juries impaneled for the guilt and sentencing phases. Second, he requested a new jury panel because the panel from which the jury would be drawn to hear the case had previously provided juries in two unrelated murder cases during the term. The court properly denied both motions.

[7] Virginia's capital murder statute expressly provides that the same jury shall decide the penalty after finding a defendant guilty of an offense punishable by death; a different jury is impaneled only if the sentence of death is later set aside or found invalid and resentencing is requested. Code § 19.2-264.3. Watkins contends that once a jury finds a man guilty of a capital offense, it is incapable of impartiality in fixing his punishment. This argument is untenable, however, in light of the sentencing statute, which has repeatedly withstood constitutional scrutiny. *See LeVasseur v. Commonwealth*, 225 Va. 564, 592-93, 304 S.E.2d 644, 659 (1983), *cert. denied*, 464 U.S. 1063, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984); *Clark*, 220 Va. at 212-13, 257 S.E.2d at 791-92; *Smith v. Commonwealth*, 219 Va. 455, 476-78, 248 S.E.2d 135, 148-49 (1978), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979).

Under § 19.2-264.4, the sentencing jury must consider, among other things, "the circumstances surrounding the offense." It is the jury's duty to consider all the evidence, both favorable and unfavorable, before fixing punishment. *Stamper v. Commonwealth*, 220 Va. 260, 275-76, 257 S.E.2d 808, 819 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980). Thus, even under the two-jury system Watkins seeks, the sentencing jury would necessarily have access to the evidence presented in the guilt phase of the trial. Such a system would give no greater assurance of impartiality than the system now used but it would needlessly require two separate trials in which the same evidence would be presented. This kind of cumbersome procedure is not mandated by the United States or Virginia constitutions. *See Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (upholding constitutionality of Texas and Georgia statutes which provide for bifurcated proceedings before the same jury on the issues of guilt and penalty).

[8] Watkins next contends that voir dire was not an adequate means to insure a fair and impartial jury where some of the members of the venire had served on juries in other murder cases during the term. Voir dire examination revealed that 15 of the 20 jurors who qualified had previously served on juries, and several had served in a capital murder trial during the same term. Nevertheless, each juror affirmed that he or she could give Watkins a fair and impartial trial and base any verdict returned on the law and the evidence.

[9, 10] The partiality or impartiality of an individual juror is a factual issue best determined by the trial court. *Patton v. Yount*, 467 U.S. ——, ——, 104 S.Ct. 2885, 2893, 81 L.Ed.2d 847 (1984). The court's finding that the jury impaneled was fair and impartial is entitled to great weight and should be set aside only for plain error. *See Hevener v. Commonwealth*, 189 Va. 802, 811, 54 S.E.2d 893, 898 (1949); *Slade v. Commonwealth*, 155 Va. 1099, 1106, 156 S.E. 388, 391 (1931). The court does not abuse its discretion when it seats a juror whom voir dire shows to be impartial, regardless of the juror's prior jury service. *Slade*, 155 Va. at 1106, 156 S.E. at 391 (jurors not incompetent to try related cases involving different issues and law in the same term); *Burford v. Commonwealth*, 132 Va. 512, 516, 110 S.E. 428, 429 (1922) (jurors not disqualified because previously convicted same defendant of different offense). Since voir dire revealed no bias or prejudice among the jurors, including those who had heard other cases, the court did not abuse its discretion in qualifying each individual juror and in refusing Watkins's motion to summon an entirely new panel.

B. Buchanan Murder.

1. Motion to Suppress.

Watkins made a pretrial motion to suppress statements given by him to the police. We have affirmed the ruling of the trial court in the appeal of his Barker murder conviction that the statements were freely, voluntarily, and intelligently given, without coercion, threat, or promise, after Watkins was properly advised of his rights. The same rationale applies in this case. Moreover, the statements were never offered in evidence in either the guilt or penalty phases of the trial.

2. Other Pretrial Motions.

Watkins moved the court for appointment of a private investigator at public expense to assist in his defense. The motion was denied. For reasons stated in the appeal of the Barker murder conviction, we affirm the ruling. *See Martin*, 221 Va. at 446, 271 S.E.2d at 130.

The trial court denied Watkins's motion for discovery of the names and addresses of all potential witnesses for the Commonwealth. For reasons stated in the appeal of the Barker murder conviction, we affirm the ruling. *See Lowe*, 218 Va. at 679, 239 S.E.2d at 118; Rule 3A:11.

[11] Watkins moved for a change of venue pursuant to Code § 19.2-251 because of publicity generated by the trial of Watkins under the indictments arising from the Barker murder. Attached to the motion were five articles which had been published in the local newspapers. The trial court, in denying the motion, found that the articles were not inaccurate, prejudicial, inflammatory, or extensive. We affirm the ruling. Where a defendant relied on 70 articles in newspapers to support his motion for a change of venue but did not allege that the articles were either inaccurate or intemperate, we affirmed the trial court's denial of the motion. *Linwood Earl Briley v. Commonwealth*, 221 Va. 532, 537, 273 S.E.2d 48, 51 (1980), *cert. denied*, 451 U.S. 1031, 101 S.Ct. 3022, 69 L.Ed.2d 400 (1981).

A motion for a change of venue is addressed to the discretion of the trial judge. Absent an affirmative showing that there has been an abuse of discretion, we will not disturb the decision. *Tuggle v. Commonwealth*, 228 Va. 493, 503, 323 S.E.2d 539, 545 (1984), *vacated and remanded*, 471 U.S. ——, 105 S.Ct. 2315, 85 L.Ed.2d 835 (1985); *Washington*, 228 Va. at 544, 323 S.E.2d at 584; *Newcomer v. Commonwealth*, 220 Va. 64, 67, 255 S.E.2d 485, 487 (1979). There has been no such showing in this case.

[12] The trial court experienced no difficulty in impaneling an impartial and qualified jury. Prospective jurors were extensively questioned by the court and by counsel on voir dire. Of the first 25 called, only five were removed for cause, one because of relationship to the defendant and four because of unalterable opposition to the death penalty, under *Witherspoon v. Illinois*, 391 U.S. 510, 522, 88 S.Ct. 1770, 1777, 20 L.Ed.2d 776 (1968). The others were found to be qualified. We hold that the trial court was fully justified in deciding that it was not necessary to grant a change of venue in order to accord Watkins a fair trial.

III. The Guilt Trial.

A. Barker Murder.

1. Admissibility of Photograph.

Watkins challenges the admission of a color photograph which depicted from close range the victim's face and a bloody gunshot wound. He asserts this photograph was unnecessary, immaterial, and inflammatory. The court held the photograph was admissible to prove the elements of the offense charged because it showed one of

the wounds and the way the victim was found.

[13] We have held repeatedly that admission of photographs is within the trial court's discretion, and the court's ruling will be disturbed only upon a showing of clear abuse of discretion. *See Poyner v. Commonwealth*, 229 Va. ——, ——, 329 S.E.2d 815, 827 (1985); *Jones*, 228 Va. at ——, 323 S.E.2d at 566–67; *Washington*, 228 Va. at 552, 323 S.E.2d at 588; *Stockton*, 227 Va. at 144, 314 S.E.2d at 384; *Bunch*, 225 Va. at 436–37, 304 S.E.2d at 278; *Peterson v. Commonwealth*, 225 Va. 289, 294, 302 S.E.2d 520, 524, *cert. denied*, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983); *Martin*, 221 Va. at 447, 271 S.E.2d at 130. Having reviewed the photograph at issue, we find no abuse of discretion in its admission. The photograph tended to show premeditation and malice. *See Stockton*, 227 Va. at 144, 314 S.E.2d at 384.

2. Admissibility of Other Evidence.

Ellen Boaz, an employee of Kwik Stop, testified early in the trial. After she was excused, she sat in the courtroom and heard the testimony of other witnesses. The Commonwealth interrupted its questioning of the Kwik Stop manager to have Boaz excused from the courtroom so she later could be recalled. The Commonwealth then elicited from the manager that he had previously seen Watkins at the market. The Commonwealth recalled Boaz to ask if she had seen Watkins at the store on prior occasions. Watkins, objecting to the recall of Boaz, offered to stipulate that he had been in the Kwik Stop before November 13. Nevertheless, the court permitted the question to be asked, and Boaz answered in the affirmative.

[14] Watkins argues the court erred in allowing Boaz's recall. We agree with the court's ruling that no harm resulted from recalling the witness since she had not heard testimony relevant to the question later asked of her and since Watkins conceded his presence at Kwik Stop at times prior to these offenses.

On direct examination of Kenny Fitzgerald, a participant in the November 13 card game, the Commonwealth elicited testimony that Fitzgerald gave Watkins $10 at Watkins's request. The Commonwealth's attorney then asked, "So he was broke?" Fitzgerald responded, "Yeah." Watkins objected to this question, but before the court ruled the Commonwealth's attorney said, "Well, I'll ask him ... do you know whether or not he had any money?" No additional objection was made, and Fitzgerald answered, "Well, I don't think he would have asked me for none, if he would have had some."

[15] Watkins contends that the court erred in not ruling on his objection, thereby allowing the Commonwealth to ask leading questions of Fitzgerald and to comment on his testimony. We find no prejudicial error since the Commonwealth rephrased the question to eliminate its leading aspect in a manner apparently satisfactory to Watkins. Moreover, Nash subsequently testified that Watkins was "broke."

[16] During cross-examination of Watkins, who testified in his own behalf, the Commonwealth attempted to impeach his testimony with a prior statement. Watkins objected to the questioning, which he alleged was argumentative, and asserted that the Commonwealth's attorney was "yelling" at him. The court ruled that the Commonwealth was entitled to cross-examine Watkins on this aspect of his testimony and allowed the questioning to proceed. The conduct of the trial is committed to the discretion of the trial court. *Justus v. Commonwealth*, 222 Va. 667, 676, 283 S.E.2d 905, 910 (1981), *cert. denied*, 455 U.S. 983, 102 S.Ct. 1491, 71 L.Ed.2d 693 (1982). Perceiving from the record no abuse of discretion, we will not disturb the court's ruling.

[17] Watkins also argues that the court erred in allowing the Commonwealth's attorney to misstate his testimony that Nash had sold him the pistol. Following a defense objection to a question which began, "if you sold Quentin Nash that gun on the

17th," the Commonwealth's attorney rephrased his question and asked, "if Nash sold you the gun, did he sell you the empty cartridges, too?" The prosecutor's misstatement in the first question was obviously inadvertent and was promptly corrected, without prejudice to Watkins, by the question which followed.

[18] On redirect examination of Nash, the Commonwealth was permitted to ask him if he was alone in the store during the commission of the offenses, to which Nash responded that he was not. Watkins contends this question exceeded the scope of cross-examination, which consisted of a single question as to the ownership of the pistol. While the question was outside the scope of cross-examination, any error in the admission of Nash's answer was harmless. Nash had previously testified in detail that Watkins was in the store when he entered and when he ran out with the cash drawer.

Watkins also argues the trial court improperly allowed the Commonwealth to question Nash about a statement Watkins allegedly made that he had robbed before. This evidence, however, was not presented until the sentencing phase of the trial, when it was admitted without objection.

3. Display of Bloody Rug.

Watkins objected to admission of the sweater the victim was wearing and the rug on which she was found. He argued that because both articles were bloody, the prejudice to Watkins would outweigh their probative value. The court ruled that both the sweater and the rug were admissible as physical evidence found at the crime scene. The rug was then displayed to the jury along with other items of physical evidence. When the Commonwealth introduced the physical evidence, however, the rug was not offered, but Watkins continued his objection because it had been displayed.

[19] On issues involving the admissibility of evidence, much must be left to the court's discretion. *See Stamper*, 220 Va. at 269–71, 257 S.E.2d at 815. Because the court properly ruled the rug admissible as physical evidence depicting the crime scene, we hold that no error resulted from its display to the jury even though it was not offered in evidence.

4. Sufficiency of Evidence.

[20, 21] Watkins challenges the sufficiency of the evidence to establish his guilt of the Barker murder. He argues that the evidence, based in large part on an accomplice's testimony, created only a suspicion of guilt. We disagree. The evidence was amply sufficient to create a jury issue. The testimony of Nash, the accomplice, was that Watkins entered the store with the intent to commit robbery and that he shot Barker in furtherance of that plan. The jury was the proper judge of Nash's credibility and the weight that should be given his testimony. *Johnson v. Commonwealth*, 224 Va. 525, 528, 298 S.E.2d 99, 101 (1982); *Coppola v. Commonwealth*, 220 Va. 243, 252, 257 S.E.2d 797, 803 (1979), *cert. denied*, 444 U.S. 1103, 100 S.Ct. 1069, 62 L.Ed.2d 788 (1980). The court instructed the jury that it should use caution in basing a conviction on the uncorroborated testimony of the accomplice. *See Johnson*, 224 Va. at 527–28, 296 S.E.2d at 101.

[22] Watkins also says the testimony of William E. Conrad, an expert in forensic science, was patently incredible so as to preclude submission of the case to the jury. Conrad stated that he was certain one of the bullets removed from the victim's body was fired from Watkins's pistol; he said there was "no margin of error." This positive statement merely affects the weight of his testimony; it does not necessarily invalidate or even weaken the results of his ballistics testing.

[23, 24] Finally, Watkins says he could not be convicted of murder in the commission of a robbery because he did not actually take the cash drawer. Rather, Nash testified that he took the drawer on Watkins's command. Under § 18.2-31, however, a defendant may be convicted of capital murder in the commission of a robbery without being a principal in the first degree

to the crime of robbery. *James Dyral Briley v. Commonwealth*, 221 Va. 563, 573, 273 S.E.2d 57, 63 (1980). The Commonwealth need only prove that the defendant actually committed the murder and was an accomplice in the robbery. *Id.* In this case, the Commonwealth met its burden. The court properly overruled Watkins's motion to strike the evidence, submitted the case to the jury, and overruled Watkins's motion to set aside the verdict.

B. Buchanan Murder.

Sufficiency of Evidence.

[25] Watkins raises similar arguments to challenge the sufficiency of the evidence to sustain his conviction for the murder of Buchanan. He argues the testimony of Darnell, an accomplice in the commission of the offenses, was suspect. As in the trial on the Barker offenses, the court gave the jury a cautionary instruction about relying on an accomplice's uncorroborated testimony. Darnell's testimony, if believed, was sufficient to convict. Additionally, Watkins's aunt confirmed portions of Darnell's testimony, stating that Watkins admitted to her that he killed Buchanan.

Watkins also challenges the credibility of Conrad, who again testified that he had no doubt that one of the bullets recovered from the victim's body was fired from Watkins's gun and that there was no possibility of mistake in his analysis. For reasons stated in the appeal of the Barker murder conviction, we hold the court properly submitted this case to the jury and properly refused to set aside the verdict.

Watkins reiterates his previous argument that he could not be convicted of murder in the commission of a robbery where he did not perpetrate the act of taking. This argument is not only meritless, for reasons stated in the appeal of the Barker murder conviction, but is inapplicable in the Buchanan case, as the Commonwealth's evidence showed that it was Watkins who actually removed the cash drawer and took Buchanan's wallet.

IV. The Penalty Trial.

A. Barker Murder.

1. Admissibility of Evidence of Buchanan Murder and Sufficiency of Evidence of Dangerousness.

During the sentencing phase of the Barker murder trial, the Commonwealth introduced detailed evidence of the Buchanan murder, for which Watkins had yet to be tried and convicted. The evidence included testimony of the Fast Fare manager, the medical examiner, the forensic scientist, and four law enforcement officers, all of whom later testified in Watkins's trial for the Buchanan murder. The Commonwealth introduced Watkins's statement of November 28 and photographs of the store and the second victim's body. Moreover, Nash testified without objection that, as he and Watkins proceeded to the Kwik Stop, Watkins assured him that there was "nothing to" the proposed robbery, that Watkins with others had committed robbery before. There was no evidence that Watkins had been charged or convicted of an earlier robbery.

Watkins contends that admission of evidence of the second murder in the first trial violated his presumption of innocence of the second offense; he says he was, in effect, tried and convicted of the Buchanan murder in the sentencing phase of the Barker murder trial. He also argues that use of evidence of unadjudicated criminal activity is restricted by statute. *See* Code § 19.2-264.2.

[26] Code § 19.2-264.2 provides that a jury may impose a sentence of death upon finding that the defendant poses a continuing serious threat to society after considering his prior "criminal record of convictions." Under Code § 19.2-264.4, however, the Commonwealth is expressly authorized to introduce "evidence of the prior history of the defendant" to establish his future dangerousness. In *LeVasseur*, we resolved any conflict in the statutory terminology and held that the difference in the language of the two provisions did not render the capital-murder sentencing scheme unconstitutionally vague. 225 Va. at 593–94, 304 S.E.2d at 660. We noted that, in determining the probability of a defendant's future criminal conduct, it is "essential ... that the jury have before it *all possible relevant information* about the individual defendant whose fate it must determine." *Id.* at 594, 304 S.E.2d at 660, quoting *Jurek v. Texas*, 428 U.S. 262, 275–76, 96 S.Ct. 2950, 2957–58, 49 L.Ed.2d 929 (1976) (emphasis added in *LeVasseur*).

Admissible evidence in the sentencing phase is not limited to the defendant's record of convictions. *Peterson*, 225 Va. at 298, 302 S.E.2d at 526. We have repeatedly approved the use of testimonial evidence relating to a defendant's commission of other crimes of which he has been convicted. *See Coleman v. Commonwealth*, 226 Va. 31, 43–44, 307 S.E.2d 864, 870–71 (1983), *cert. denied*, 465 U.S. ——, 104 S.Ct. 1617, 80 L.Ed.2d 145 (1984); *Peterson*, 225 Va. at 298, 302 S.E.2d at 526; *Quintana*, 224 Va. at 147–48, 295 S.E.2d at 653–54; *Stamper*, 220 Va. at 275–77, 257 S.E.2d at 819–20. In *Stamper* we said, "In determining his proclivity for violence, the jury may obtain from the mere record of previous convictions an inaccurate or incomplete impression of the defendant's temperament and disposition." 220 Va. at 276, 257 S.E.2d at 819.

We have also held to be admissible in the sentencing phase evidence of other crimes for which a defendant has not been convicted. *See Poyner*, 229 Va. at ——, 329 S.E.2d at 827; *Stockton*, 227 Va. at 147, 314 S.E.2d at 385. In *Poyner*, the Commonwealth was permitted to introduce the defendant's video-taped confession to five murders in the sentencing phases of three capital-murder trials (Williamsburg and Newport News cases), although he had not yet been tried and convicted of all five offenses. 229 Va. at ——, ——, 329 S.E.2d at 827, 837. The confession was deemed "highly reliable and wholly relevant to the issue of future dangerousness." 229 Va. at ——, 329 S.E.2d at 828. The Commonwealth also was permitted to introduce the testimony of the victim of assault and battery, although there was no evidence that Poyner was tried or convicted of the offense which she described. 229 Va. at ——, 329 S.E.2d at 827.

In *Stockton*, a witness had testified to Stockton's murder of a second victim. That evidence, admissible in the guilt phase because the two offenses were interrelated and because the second murder demonstrated Stockton's guilty knowledge of the first and his attempt to conceal his guilt, we also deemed relevant to establish the defendant's propensity for future crimes of violence. 227 Va. at 143, 147, 314 S.E.2d at 383, 385.

[27, 28] Adhering to these rulings, we hold that evidence of prior unadjudicated criminal conduct, while generally not admissible in the guilt phase of a capital-murder trial, may be used in the penalty phase to prove the defendant's propensity to commit criminal acts of violence in the future. *See Clines v. State*, 280 Ark. 77, 91–92, 656 S.W.2d 684, 690 (1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1328, 79 L.Ed.2d 723 (1984); *State v. Rault*, 445 So.2d 1203, 1214–15 (La.), *cert. denied*, —— U.S. ——, 105 S.Ct. 225, 83 L.Ed.2d 154 (1984); *Williams v. State*, 668 S.W.2d 692, 694 (Tex.Crim.App.1983) (evidence of unadjudicated criminal activity admitted in sentencing phase of capital-murder proceedings). Here, in his statement introduced in evidence, Watkins claimed he shot Buchanan, an unarmed man who he thought was reaching for a weapon, four times in self-defense. The jury could find this explanation incredible. The evidence of Watkins's involvement in the Buchanan murder and commission of an earlier robbery, together with his prior convictions for assault and battery and possession of a concealed weapon, was sufficient to support a jury finding of his future dangerousness.

2. Sufficiency of Evidence of Vileness.

Watkins argues that the evidence was insufficient to establish vileness and the court therefore erred in instructing the jury on this aggravating circumstance. Even if the evidence were insufficient to sustain a finding of vileness, the imposition of the death sentence in this case would nonetheless be proper because the jury found, on sufficient evidence, that Watkins is likely to constitute a continuing serious threat to society. *Zant v. Stephens*, 462 U.S. 862, 881, 103 S.Ct. 2733, 2745, 77 L.Ed.2d 235 (1983). We hold, however, that the evidence was sufficient to establish vileness.

So far as is pertinent here, Code § 19.2-264.2 authorizes imposition of a death sentence if the jury finds that the defendant's conduct "was outrageously or wantonly vile, horrible or inhuman in that it involved ... an aggravated battery." The court's instruction permitted the jury to find that Watkins's conduct constituted vileness in that it involved an aggravated battery. The question is whether there was sufficient evidence to support the instruction and the jury's finding of an aggravated battery, defined as one "which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." *Smith*, 219 Va. at 478, 248 S.E.2d at 149; *see also Edmonds v. Commonwealth*, 229 Va. ——, ——, 329 S.E.2d 807, 814 (1985); *Turner v. Commonwealth*, 221 Va. 513, 527, 273 S.E.2d 36, 45 (1980), *cert. denied*, 451 U.S. 1011, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981); *Clark*, 220 Va. at 211, 257 S.E.2d at 790.

The evidence established that Watkins fired four shots at Barker, inflicting one facial and two chest wounds. He first fired two shots across the store counter and she fell to the floor. After Nash fled with the cash drawer, Watkins leaned across the counter and fired two more shots.

[29, 30] An aggravated battery is not proven where the evidence shows that the victim died almost instantaneously from a single gunshot wound. *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); *Peterson*, 225 Va. at 296, 302 S.E.2d at 525. However, proof of infliction of multiple wounds may meet the test for an aggravated battery. *See Boggs v. Commonwealth*, 229 Va. ——, ——, 331 S.E.2d 407, —— (1985) (this day decided); *Edmonds*, 229 Va. at ——, 329 S.E.2d at 814. In this case, Watkins exceeded the quality and quantity of force necessary to accomplish Barker's murder. The shots were separated by a lapse of time, during which Nash first refused and then obeyed Watkins's order to take the cash drawer to the car. Death was not instantaneous. We hold that this evidence is sufficient to sustain the court's giving of an instruction on vileness based on aggravated battery and the jury's finding under the instruction. *See Turner*, 221 Va. at 518, 527, 273 S.E.2d at 39, 45 (aggravated battery established by evidence that defendant shot store owner in head and, after lapse of time during which two occupants fled and police officer urged defendant not to shoot again, inflicted fatal chest wounds because owner had previously triggered an alarm).

3. Constitutionality of Sentencing Statutes and Form Verdict.

[31] Watkins reiterates arguments previously made in capital cases that Code §§ 19.2-264.2 and -264.4 are unconstitutional. Having repeatedly upheld the constitutionality of these provisions, we adhere to our prior rulings. *See, e.g., LeVasseur*, 225 Va. at 592-94, 304 S.E.2d at 659-60 (statutes facially constitutional and not vague); *Whitley v. Commonwealth*, 223 Va. 66, 77-78, 286 S.E.2d 162, 168-69, *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982) (death penalty not cruel and unusual punishment and not arbitrarily and capriciously imposed); *James Dyral Briley*, 221 Va. at 577-80, 273 S.E.2d at 65-67 (sentencing statutes not overbroad or vague); *Clark*, 220 Va. at 212, 257 S.E.2d at 791 (death penalty imposed for

appropriate crimes under objective standards); *Smith*, 219 Va. at 476-78, 248 S.E.2d at 148-49 (death penalty not cruel and unusual punishment, jury not vested with standardless discretion, and statutes not void for vagueness).

[32] Watkins also contends that the statutory verdict form is unconstitutional because it places undue emphasis on the aggravating circumstances of future dangerousness and vileness without similarly emphasizing the jury's duty to consider mitigating factors. He also challenges the form verdict because it fails to state the standard of proof for mitigation. States are not constitutionally required "to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances." *Zant*, 462 U.S. at 890, 103 S.Ct. at 2750. The jury is instructed to consider mitigating circumstances, and the form verdict reflects that a jury may sentence a defendant to death only after "having considered the evidence in mitigation of the offense." Code § 19.2-264.4. These safeguards sufficiently satisfy the constitutional requirement that the jury's discretion be "guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." *Proffitt v. Florida*, 428 U.S. 242, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913 (1976).

Listing of aggravating factors in the form verdict without a comparable listing of mitigating factors benefits rather than prejudices the accused. *Clark*, 220 Va. at 212, 257 S.E.2d at 791. Aggravating factors are expressly limited to those specified by statute, while any circumstances in mitigation may be considered. *Id.; see Smith*, 219 Va. at 479, 248 S.E.2d at 149. Hence, the form verdict, which follows the language of the statute, is constitutional.

4. Propriety of Trial Court's Sentence.

The trial court received a post-sentence report as mandated by Code § 19.2-264.5. After conducting a sentencing hearing at which Watkins offered no additional evidence, the court imposed the death sentence in accordance with the jury's verdict. Watkins argues that his age, 22 years, and his lack of a "significant" prior criminal record required the court to impose a life sentence. We do not agree. Under § 19.2-264.5, the court may set aside the death sentence "upon good cause shown," and the trial court could reasonably conclude from the evidence that good cause had not been shown.

[33] Watkins's age did not *per se* preclude imposition of the death penalty; it was merely a factor to be considered by the jury. *Peterson*, 225 Va. at 300, 302 S.E.2d at 527. Watkins's criminal history, as revealed by the post-sentence report, included, in addition to the assault and possession convictions in evidence at the sentencing phase, one larceny and two shoplifting convictions and a charge of robbery which was dismissed.

[34] Watkins contends on brief that the sentence of death was racially motivated because he is black but the victim and all the jurors were white. A black defendant is not constitutionally entitled to a jury containing members of his own race. *Swain v. Alabama*, 380 U.S. 202, 203, 85 S.Ct. 824, 826, 13 L.Ed.2d 759 (1965); *Brown v. Commonwealth*, 212 Va. 515, 516, 184 S.E.2d 786, 787 (1971), *vacated in part*, 408 U.S. 940, 92 S.Ct. 2877, 33 L.Ed.2d 763 (1972); *see Turner*, 221 Va. at 523, 273 S.E.2d at 42. In order to establish a violation of the Equal Protection Clause, he must demonstrate purposeful or deliberate exclusion of blacks from jury service on the basis of race. Such discrimination "may not be assumed or merely asserted" but must be proven. *Swain*, 380 U.S. at 203-09, 85 S.Ct. at 826-30.

[35] Watkins has presented no evidence that the jury selection procedures in this case departed from the random selection procedures mandated by statute. *See* Code §§ 19.2-260, 8.01-343 to -363. He merely relies on his allegation that the jury was entirely white in composition. His bare

assertion of racial motivation is insufficient to establish systematic exclusion of blacks from membership on juries. He did not challenge the racial composition of the jury at trial, and nothing in the record suggests that his sentence resulted from racial prejudice.

Watkins also argues that the closing argument of the Commonwealth's attorney was improper because it appealed to the jury's passions. This objection was not raised at trial, and we will not notice it for the first time on appeal. Rule 5:21.

Before sentencing Watkins to death, the judge said, "I have reflected upon the evidence which was presented.... After considering all these matters, the Court is of the opinion that the verdict of the jury is both appropriate and just...." We hold that the court did not abuse its discretion in imposing the death sentence.

B. Buchanan Murder.

1. Sufficiency of Evidence of Vileness.

Watkins challenges the sufficiency of the evidence to support an instruction and a jury finding on the existence of vileness. The evidence established that Watkins fired four shots at Buchanan, resulting in wounds to the head, chest, and back. He fired two shots, after which Buchanan fell backward. Watkins then went around the counter, removed the cash drawer, disappeared from sight behind the counter, and fired two additional shots. He returned to the car with the cash drawer and Buchanan's wallet. Medical evidence established that the two chest injuries caused Buchanan's death and that either of these wounds independently would have been fatal.

As in the Barker killing, Watkins's conduct exceeded that necessary to accomplish the murder. Again, he allowed an appreciable lapse of time between shots, during which he removed the drawer and wallet. Again, the victim's death was not shown to be instantaneous. As in the Barker case, the court instructed the jury that it could find vileness based on conduct which involved an aggravated battery. For reasons stated in the appeal of the Barker murder conviction, we hold the evidence sufficient to support the court's instruction on vileness and the jury's verdict.

2. Constitutionality of Sentencing Statutes and Form Verdict.

Watkins restates the arguments raised in the Barker appeal that Code §§ 19.2-264.2 and -264.4 and the form verdict provided in § 19.2-264.4 are unconstitutional. For reasons stated in that appeal, we affirm the constitutionality of these statutory provisions.

3. Propriety of Trial Court's Sentence.

[36] Watkins contends, as he did in the Barker appeal, that the trial court disregarded the evidence of mitigating factors and imposed the death sentence under the influence of passion, prejudice, or other arbitrary factors. He specifically notes, in addition to his age and criminal record, his limited education, low average intelligence, and history of episodic substance abuse. Each of these factors was shown by the evidence during the sentencing phase or was reflected by the post-sentence report. Following a sentencing hearing, at which Watkins offered no additional evidence, the court imposed the death sentence in accordance with the jury's verdict, noting Watkins's earlier conviction for capital murder. There is no evidence that the court refused to consider the mitigating circumstances, and we hold that the court did not abuse its discretion in imposing the death sentence.

Watkins also reiterates his charge that the jury sentenced him to death as a result of racial prejudice and that the Commonwealth's attorney used improper argument. For reasons stated in the Barker appeal we reject these contentions.

V. Sentence Review—Both Cases.

Pursuant to Code § 17-110.1, we are required to consider and determine whether the death sentences in these cases were imposed under the influence of passion, prejudice, or other arbitrary factors. We have rejected in each appeal Watkins's contentions that there were failures to consid-

er mitigating factors, racial bias, and improper prosecutorial argument. A thorough review of the record in each case reveals nothing to suggest that either death sentence was imposed under the influence of passion, prejudice, or other arbitrary factors.

[37] We are also required to determine whether the death sentences in these cases are excessive or disproportionate to the sentences imposed in similar cases. Comparing the cases with other capital murder cases reviewed by this Court, we have given particular emphasis to cases in which the death sentence was based on both the defendant's future dangerousness and the vileness of the crime.[2] We have also considered the records of all capital cases reviewed by this Court under the present statutes in which life sentences were imposed. It is clear from this review that the sentences of death for the Barker and Buchanan murders are not excessive or disproportionate to sentences generally imposed for similar crimes throughout the Commonwealth.

Of particular interest in this comparison is *Turner*, in which we upheld a death sentence based on both the future dangerousness of the defendant and the vileness of the crime. 221 Va. at 530-31, 273 S.E.2d at 47. The facts in *Turner* are substantially similar to those in the Barker and Buchanan murders for purposes of this review. We hold that the sentences imposed in these two cases are not excessive or disproportionate when compared with *Turner* and other cases. Moreover, the sentences are not excessive or disproportionate when compared with each other. In these cases, which are factually indistinguishable, two distinct juries reviewed the evidence and reached the same result, finding that the aggravating circumstances of future dangerousness and vileness warranted imposition of the death penalty.

Finding no reversible error in the trial of these cases and determining that the death sentences are properly imposed, we will affirm the judgments of the trial court in both cases.

Record No. 841551—Affirmed.

Record No. 841913—Affirmed.

E. Blair BROWN, Executor, etc.

v.

E.N. KOULIZAKIS, et al.

Record No. 820473.

Supreme Court of Virginia.

June 14, 1985.

Deceased patient's executor filed wrongful death action against orthopedic

2. Cases based on both predicates are compiled in *Tuggle*, 228 Va. at 517, 323 S.E.2d at 554. Cases relying on both future dangerousness and vileness to support the death penalty, not included in that list, are *Tuggle v. Commonwealth*, 228 Va. 493, 323 S.E.2d 539 (1984), *vacated and remanded*, 471 U.S. ——, 105 S.Ct. 2315, 85 L.Ed.2d 835 (1985), *Edmonds v. Commonwealth*, 229 Va. ——, 329 S.E.2d 807 (1985), and *Poyner v. Commonwealth*, 229 Va. ——, 329 S.E.2d 815 (1985).

Cases in which vileness alone formed the basis for imposition of the death penalty are collected in *Jones*, 228 Va. at 450-51 n. 3, 323 S.E.2d at 567 n. 3. Subsequent cases relying only on vileness are *Jones v. Commonwealth*, 228 Va. 427, 323 S.E.2d 554 (1984), *Washington v. Commonwealth*, 228 Va. 535, 323 S.E.2d 577 (1984), *cert. denied*, 471 U.S. ——, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985), and *Boggs v. Commonwealth*, 229 Va. ——, 331 S.E.2d 407 (1985) (this day decided).

Dangerousness was the basis for the death sentence in the following cases: *Evans v. Commonwealth*, 228 Va. 468, 323 S.E.2d 114 (1984) (affirming imposition of death penalty upon resentencing after prior sentence, which had been upheld in 222 Va. 766, 284 S.E.2d 816 (1981), *cert. denied*, 455 U.S. 1038, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982), was vacated by trial court); *Peterson v. Commonwealth*, 225 Va. 289, 302 S.E.2d 520, *cert. denied*, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983); *Bassett v. Commonwealth*, 222 Va. 844, 284 S.E.2d 844 (1981), *cert. denied*, 456 U.S. 938, 102 S.Ct. 1996, 72 L.Ed.2d 458 (1982); *Giarratano v. Commonwealth*, 220 Va. 1064, 266 S.E.2d 94 (1980).

APPENDIX B

SUPREME COURT OF THE UNITED STATES

JOHNNY WATKINS, JR. v. VIRGINIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 85-6284. Decided March 31, 1986

The petition for a writ of certiorari is denied.

Opinion of JUSTICE STEVENS respecting the denial of the petition for certiorari.

As JUSTICE MARSHALL explains in his dissenting opinion, the violation of petitioner's Fifth Amendment right to counsel requires that the sentence of death for the shooting of Betty Jean Barker be set aside. However, in view of the fact that, as petitioner has presented the issue, this error would not appear to have affected the validity of the conviction or the death sentence for the murder of Carl Douglas Buchanan, I agree with the Court's decision to deny certiorari and allow the error to be corrected in collateral proceedings.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

In the landmark case of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), this Court held that before police institute custodial interrogation of an individual, they must inform him of his right to consult with counsel. *Miranda* further required that the police respect the individual's decision to exercise that right. We stated, in clear and mandatory language:

> "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." *Id.*, at 474.

We reaffirmed that rule in *Fare* v. *Michael C.*, 442 U. S. 707, 719 (1979) ("the Court fashioned in *Miranda* the rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease"); see also *Rhode Island* v. *Innis*, 446 U. S. 291, 298 (1980); *Michigan* v. *Mosley*, 423 U. S. 96, 104, n. 10 (1975); *id.*, at 109–111 (WHITE, J., concurring in the result). We refined the rule in *Edwards* v. *Arizona*, 451 U. S. 477, 485 (1981), explaining that the right to counsel, once asserted, cannot be waived "unless the accused himself initiates further communication, exchanges, or conversations with the police." We emphasized: "[I]t is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel."

In this case, the Court acquiesces in a blatant denial of that Fifth Amendment right by the police and the courts of the State of Virginia. Unwilling to ignore that violation, I dissent from the denial of certiorari.

I

Petitioner Johnny Watkins, Jr. was charged with the murder of Betty Jean Barker. The State announced its intention to introduce at the penalty phase of that trial a statement made by Watkins in connection with an unrelated murder. During the pretrial suppression hearing, the following facts emerged.

Watkins was arrested in the evening of November 22, 1983, as a suspect in the murder of Carl Douglas Buchanan. He was questioned about 11 p. m. and signed a waiver-of-rights form, but then told the interrogating officer that he wanted to see a lawyer. Interrogation ceased temporarily.

About two hours later, Watkins was informed that he was being charged with the murder of Buchanan. He asked why he was being charged, and was given a second waiver-of-rights form to execute. The police then told Watkins that his brother Darnell had implicated him in the murder, played for him a portion of Darnell's recorded statement, and took him to see Darnell. Watkins refused to talk to police about the shooting.

The police did not supply Watkins with a lawyer. They instead transferred him to the county jail, held him there until November 28, and then reinterrogated him. Testimony was conflicting as to what happened at the November 28 meeting. The parties agreed that a police officer went to the jail to interrogate Watkins, and had him sign a waiver-of-rights form. Watkins testified that he again asked for a lawyer but that the officer ignored his request, and that the officer "nagg[ed]" him until he admitted to the shooting of Buchanan. The officer testified that Watkins never stated on November 28 that he wanted to stop the questioning or consult with a lawyer, and that he gave his statement without apparent hesitation. The Barker trial court apparently credited the officer's testimony. There was no dispute, however, that Watkins had requested a lawyer five days earlier, had not received one, had not himself reinitiated questioning, and had been questioned again nonetheless.

Watkins' statement implicating himself in the Buchanan killing, along with extensive other evidence of that crime, was admitted over objection in the penalty phase of Watkins' trial for the shooting of Barker. The jury sentenced Watkins to death. Some months later, Watkins was convicted of the murder of Buchanan, and was given a second death sentence.

The facts of this case constitute a plain violation of petitioner's Fifth Amendment right to counsel. Our law sets out a bright-line rule that all questioning must cease after an accused requests counsel, so that repeated police questioning does not "wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith* v. *Illinois*, —— U. S. ——, —— (1984) *(per curiam)*. The accused may not be found to have waived

that right, once he asserts it, unless he himself reinitiates questioning. *Ibid.*

In this case, Watkins made an undisputed and unequivocal request for counsel on November 22, and refused to talk to the authorities in counsel's absence. The response of the police was to hold Watkins without a lawyer for five days and then to interrogate him again. Even if the trial court credited the police officer with respect to the events of November 28, that interrogation was impermissible under *Miranda* and its progeny, and any statement so elicited should not have been admitted in the penalty phase of a capital proceeding. See *Estelle* v. *Smith*, 451 U. S. 454, 462–463 (1981); see also *Del Vecchio* v. *Illinois*, —— U. S. —— (1985) (MARSHALL, J., dissenting from denial of certiorari).

II

Respondent State of Virginia contends that petitioner did not adequately present his Fifth Amendment claim to the Supreme Court of Virginia. It focuses on the fact that Watkins did not include the magic words "*Edwards* v. *Arizona*" in his brief to that court. This contention has no merit. *Edwards* merely set out an elaboration of the basic rule of *Miranda*, and Watkins cited expressly to *Miranda* below. He argued to the trial court that the statement had been taken in violation of his Fifth Amendment right to counsel. He argued to the appellate court that his statement had been taken in violation of his Fifth Amendment rights and was involuntary, focusing on his claim that police had ignored an express request for counsel on November 28. While Watkins did not present his argument below as proficiently as he now does in his petition for certiorari, he unmistakably raised below and reasserts here a claim that the November 28 statement was taken in violation of his Fifth Amendment right to counsel. The denial of his November 22 request for counsel is part and parcel of that claim. See *Eddings* v. *Oklahoma*, 455 U. S. 104, 113–114, n. 9 (1982).

III

The Court today allows Watkins' death sentence to stand notwithstanding the illegality of the evidence introduced before the jury in its sentencing deliberations. The denial of his petition adds to a long line of cases in which the Court has declined to review capital sentences marred by the sort of violation described here. *E. g.*, *Henderson* v. *Florida*, —— U. S. —— (1985) (MARSHALL, J., dissenting from denial of certiorari); *James* v. *Arizona*, —— U. S. —— (1984) (BRENNAN, J., dissenting from denial of certiorari); *Johnson* v. *Virginia*, 454 U. S. 920 (1981) (MARSHALL, J., dissenting from denial of certiorari). I dissent.

APPENDIX C

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF DANVILLE

JOHNNY WATKINS, JR.,

Petitioner,

v.

DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

ORDER

Came petitioner, Johnny Watkins, by counsel, John B. Boatwright, III, and respondent, by counsel, Frank S. Ferguson, Assistant Attorney General, upon petitioner's application for a writ of habeas corpus. Upon mature consideration of the petition, the answer of the respondent, and the petitioner's reply thereto, the Court finds, for the reasons stated in the respondent's Answer, that a plenary hearing is required on certain of petitioner's allegations and that petitioner is not entitled to habeas corpus relief on the remainder of the allegations. Accordingly, it is, therefore,

ADJUDGED, ORDERED and DECREED that a plenary hearing will be had in this Court on Monday, June 22, 1987, at 9:00 a.m. on the allegations set forth in the petition in paragraph 2(c)(1), 2(c)(2), 2(c)(3), 2(c)(4), 3(a), 3(b), and 3(d).

It is further ORDERED that the allegations appearing in paragraph 2(a), 2(b), 3(c) and 4 of the petition are hereby denied and dismissed, to which action of this Court the petitioner's objections are hereby noted.

It is further ORDERED that the petition for a writ of habeas corpus is hereby severed so that allegations involving petitioner's conviction for the capital murder of Carl Douglas Buchanan will be heard and pled separately from allegations involving petitioner's conviction for the capital murder of Betty Jean Barker.

It is further ORDERED that the Clerk of this Court shall forthwith forward a certified copy of this Order to John B. Boatwright, III, 4 North First Street, Richmond, Virginia 23219, and to John B. Orenstein, Esquire, 1 Rockefeller Plaza, New York, New York 10020, Counsel for Petitioner, and to Frank S. Ferguson, Assistant Attorney General, 101 North Eighth Street, Richmond, Virginia 23219, Counsel for Respondent.

ENTER: 6/5/87

James L. Ingram
Judge

I ask for this:

F.S. Ferguson
Counsel for Respondent

Seen:

Counsel for Petitioner

A COPY-TESTE:
GERALD A. GIBSON, CLERK
BY: .. Tamra Terry
DEPUTY CLERK

APPENDIX D

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF DANVILLE

JOHNNY WATKINS, JR., NO. 139748,
Petitioner,

v. Case No. _____
(Barker case)

EDWARD W. MURRAY, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

FINAL ORDER

On March 30, 1988, came the petitioner, in person, and by John B. Boatwright, III, Esquire, and came also the respondent, by counsel, by Frank S. Ferguson and Katherine B. Toone, Assistant Attorneys General, to be heard upon the petition for a writ of habeas corpus, as supplemented by the amended petition for a writ of habeas corpus, upon pleadings duly received and filed and orders heretofore entered.

After hearing the evidence and considering the record of the criminal trial, which upon motion of respondent was made a part of the record in this proceeding, the pleadings and post-hearing memoranda of both parties, the Court finds for the reasons stated in its Findings of Fact and Conclusions of Law, which is incorporated and made a part of this Order, that the petitioner is not entitled to the relief sought.

For the foregoing reasons, the Court is of the opinion that the petition for a writ of habeas corpus, as supplemented by the amended petition for a writ of habeas corpus, should be denied and dismissed as to allegations (c),(d),(e),(f),(g),(h), and (i),

...ations (a),(b), and (j) having been heretofo dismissed by ...der of this Court entered on June 5, 1987; it is, therefore,

ADJUDGED AND ORDERED that the petition and amended petition for a writ of habeas corpus be, and are hereby, denied and dismissed, to which action of the Court petitioner notes his objections.

The Clerk is directed to forward certified copies of this Order and of the Findings of Fact and Conclusions of Law to the petitioner; John B. Boatwright, III, Esquire, counsel for petitioner; the respondent; and Frank S. Ferguson, Assistant Attorney General.

Enter this 28th day of Oct., 1988.

B A Davis
Judge

I ask for this:

Frk S Ferguson
Counsel for respondent

Seen and Objected to:

Counsel for petitioner

A COPY TESTE:
GERALD A. GIBSON, CLERK
BY Jean C. Stephens DEPUTY CLERK

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF DANVILLE

JOHNNY WATKINS, JR., NO. 139748,
Petitioner,

v. Case No. _____
(Buchanan case)

EDWARD W. MURRAY, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

FINAL ORDER

On March 30, 1988, came the petitioner, in person, and by John B. Boatwright, III, Esquire, and came also the respondent, by counsel, by Frank S. Ferguson and Katherine B. Toone, Assistant Attorneys General, to be heard upon the petition for a writ of habeas corpus, as supplemented by the amended petition for a writ of habeas corpus, upon pleadings duly received and filed and orders heretofore entered.

After hearing the evidence and considering the record of the criminal trial, which upon motion of respondent was made a part of the record in this proceeding, the pleadings and post-hearing memoranda of both parties, the Court finds for the reasons stated in its Findings of Fact and Conclusions of Law, which is incorporated and made a part of this Order, that the petitioner is not entitled to the relief sought.

For the foregoing reasons, the Court is of the opinion that the petition for a writ of habeas corpus, as supplemented by the amended petition for a writ of habeas corpus, should be denied and dismissed as to allegations (a), (b), (d), (e), (f) and (g),

allegations (c) and (h) having been heretofore dismissed by Order of this Court entered on June 5, 1987; it is, therefore,

ADJUDGED AND ORDERED that the petition and amended petition for a writ of habeas corpus be, and are hereby, denied and dismissed, to which action of the Court petitioner notes his objections.

The Clerk is directed to forward certified copies of this Order and of the Findings of Fact and Conclusions of Law to the petitioner; John B. Boatwright, III, Esquire, counsel for petitioner; the respondent; and Frank S. Ferguson, Assistant Attorney General.

Enter this 28th day of Oct. 1988.

B D Davis
Judge

I ask for this:

Frank S Ferguson
Counsel for respondent

Seen and Objected to:

Counsel for petitioner

A COPY TESTE:
GERALD A. GIBSON, CLERK
BY Jean C. Stephens
DEPUTY CLERK

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF DANVILLE

JOHNNY WATKINS, JR., No. 139748,
Petitioner,

Case No._____
(Barker Case)

v.

EDWARD M. MURRAY, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

Case No._____
(Buchanan Case)

FINDING OF FACTS AND CONCLUSIONS OF LAW

I. The Court finds that the Petitioner's allegations that he was, at the time of the alleged offense(s), under the influence of alcohol and controlled substances to the extent that his ability and reasoning power was impaired, is without merit and not substantiated.

The Court further finds that defense counsel was not ineffective in not attempting to show that the Petitioner was under the influence of alcohol and/or drugs at the time of the commission of the murder(s) for which he stands convicted.

II. The Court finds that the Petitioner's confession was lawfully taken after being advised of his rights as dictated by Miranda v. Arizona.

III. The Court finds that the jury was properly instructed as to all matters and findings that they were required to make, including but not limited to evidence in mitigation of punishment.

IV. The Court finds that defense counsel did fulfill their obligation to interview the Petitioner and all possible witnesses that may have had information beneficial to the Petitioner.

V. The Court finds that defense counsel were not negligent in failing to request an additional psychiatric examination for the Petitioner.

VI. The Court finds that the peremptory strikes of the jury by the Commonwealth were proper and there was no systematic exclusion of black jurors.

ENTER: This 28th day of October, 1988

B. A. DAVIS, III, JUDGE

A COPY TESTE:
GERALD A. GIBSON, CLERK
BY Jean C. Stephens
DEPUTY CLERK

APPENDIX E

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 13th *day of* April, 1989.

Johnny Watkins, Jr., Appellant,

against Record No. 890124
Circuit Court No. LP86-46 (H.C.)

Edward Murray, Director, Virginia Department of Corrections, Appellee.

From the Circuit Court of the City of Danville

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, and applying the rule of Brooks v. Peyton, 210 Va. 318, 171 S.E.2d 243 (1969), and the rule of Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), cert. denied, 419 U.S. 1108 (1975), to assignment of error No. I, and Rule 5:25 to assignment of error No. II, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

It is ordered that the Commonwealth recover of the appellant the costs in the court below.

A Copy,

Teste:

David B. Beach, Clerk

By: D.A.

Deputy Clerk

APPENDIX F

INSTRUCTION NO. 1

THE COURT INSTRUCTS THE JURY THAT you have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or life imprisonment. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:

(1) That, after consideration of the circumstances surrounding this offense or the prior history and background of the defendant, there is probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or

(2) That the defendant's conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved an aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt either of the two alternatives, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified then you shall fix the punishment of the defendant at life imprisonment.

If the Commonwealth has failed to prove either alternative beyond a reasonable doubt, then you shall fix the punishment of the defendant at life imprisonment.

given 7-3-3 JHL

INSTRUCTION NO. 2

THE COURT INSTRUCTS THE JURY THAT aggravated battery means a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder.

794

Given VFI

THE COURT: Ladies and gentlemen of the jury, there are two alternative verdicts in this case. Those verdicts have been framed in a manner in which I'll read to you in just a moment. But your choice in this case is to consider the evidence which you've heard, the instructions which you have been given by the Court, and the argument of counsel, and arrive at a verdict which is in accordance with the contents of these verdict forms, and which read as follows: "We the jury, on the issue joined, having found the defendant guilty of the willful, deliberate and premeditated murder of Betty Jean Barker, in the commission of robbery, while armed with a deadly weapon, and that after consideration of his prior history, that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, and/or his conduct in committing the offenses outrageously or wantonly vile, horrible or inhuman, and that it involved aggravated battery to the victim, and having considered the

evidence in mitigation of the offense, unanimously fix his punishment at death." If you believe the Commonwealth has proven, beyond a reasonable doubt, either or the two things that have a mark, you should check either or both of those, if you use this verdict form, and have the foreman of the jury affix his or her signature. If you do not believe that the Commonwealth has proven either of those requirements, in order for the punishment of death to be imposed, or that you believe that the punishment should be imprisonment at life, you should use the alternative verdict, which reads: "We the jury, on the issue joined, having found the defendant guilty of the willful, deliberate and premeditated murder of Betty Jean Barker, in the commission of robbery, while armed with a deadly weapon, and having considered all the evidence and aggravation and mitigation of such offense, fix his punishment at imprisonment for life." Now, whichever verdict you return in this case, have the foreman affix his or her signature. If you return a verdict, in which your verdict is that the defendant be punishable by death, you must either check one or two or both of the blanks provided in the first form of the verdict form. Mrs. Doss, Mrs. Brann . . . if you will stand aside please. Ladies and gentlemen of the jury, you may retire to the juryroom and commence your deliberation.

****

BETTY G. THOMPSON
REGISTERED PROFESSIONAL REPORTER
DANVILLE, VIRGINIA

APPENDIX G

The jury retired to the juryroom, to commence their deliberations, at 5:31 P. M., and returned at 5:51 P. M., with the following verdicts:

THE COURT: All right gentlemen, the jury is ready. Bring the jury in, please. (Jury was brought into the courtroom, by the bailiff)

CLERK: Ladies and gentlemen of the jury, have you agreed upon a verdict? (To which they indicated an affirmative response) Listen to your verdict: "We the jury on the issue joined, have found the defendant guilty of the willful, deliberate and premeditated murder of Betty Jean Barker, in the commission of a robbery, while armed with a deadly weapon, and that after considerion of his prior history, that there is a probability that he will commit criminal acts of violence, that would constitute a continuing serious threat to society, and his conduct in committing the offense was outrageous and wantonly vile, horrible and inhuman, in that it involved aggravated battery to the victim, and having considered the evidence in mitigation on the offense, unanimously fix his punishment at death. Signed: George E. Carter, Jr., Foreman." So say you all ladies and gentlemen? (To which each responded in the affirmative) So say they all, Your Honor.

THE COURT: Gentlemen, do you care to have the jury polled?

We, the Jury, on the issue joined, having found the defendant guilty of the willful, deliberate and premeditated murder of Carl Douglas Buchanan in the commission of robbery, while armed with a deadly weapon, and that:

_X_ after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; and/or

_X_ his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved aggravated battery to the victim;

and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Charles B. Battaglia
Foreman

We, the Jury, on the issue joined, having found the defendant guilty of the willful, deliberate and premeditated murder of Carl Douglas Buchanan in the commission of robbery, while armed with a deadly weapon, and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

_____
Foreman

MAILING CERTIFICATE

I hereby make oath that I, Steven C. Losch, a member of the Bar of the State of New York did place the original of this Petition for Writ of Certiorari in the mailbox on July 10, 1989, first-class postage prepaid, addressed to the Clerk of this Court, and that I sent the same day a copy of the foregoing to Donald R. Curry, Senior Assistant Attorney General, 101 N. Eighth Street, Richmond Virginia 23219.

Steven C. Losch

STATE OF NEW YORK

AT LARGE

This 6th day of July, 1989 appeared before me Steven C. Losch, and acknowledged the above as being true to the best of his knowledge and belief.

Notary Public

My Commission Expires: